EUROPEAN COMMISSION

Brussels, 23.03.2015

C(2015) 66 final

In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […].		PUBLIC VERSION This document is made available for information purposes only.

COMMISSION DECISION

of 23.03.2015

ON STATE AID
SA 28876 (2012/C) (ex CP 202/2009)

[implemented by Greece

for Container Terminal Port of Piraeus & Cosco Pacific Limited]

(Only the Greek version is authentic)

(Text with EEA relevance)

COMMISSION DECISION

of 23.03.2015

ON STATE AID
SA 28876 (2012/C) (ex CP 202/2009)

[implemented by Greece

for Piraeus Container Terminal S.A. & Cosco Pacific Limited]

(Only the Greek version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having called on interested parties to submit their comments pursuant to Article 6 of Regulation 659/1999[1] and having regards to the comments received from Greece and the Piraeus Container Terminal S.A.,

Whereas:

1. Procedure

(1) By letter of 30 April 2009, the Prefect of Piraeus lodged a complaint with the Commission alleging that the Greek State granted unlawful State aid to the new concession holder of a part of the Port of Piraeus, the Piraeus Container Terminal S.A. ("PCT"), a subsidiary of special purpose of COSCO Pacific Limited ("COSCO"). The alleged aid was granted in the form of tax exemptions and favourable provisions inserted in the concession agreement after the tender.

(2) On 7 May 2009 the Federation of Greek Port workers sent a letter[2] informing the Commission on the alleged tax advantages that the Greek State granted to PCT. By letter of 31 August 2009, the Federation of Greek Port workers confirmed that its initial letter should be treated as a complaint and alleged that aid was granted in the form of tax advantages but also in the form of favourable provisions inserted in the concession agreement.

[1] OJ L 83 of 27.3.1999, p. 1.
[2] Registered by the Commission on 13 May 2009.

(3) By letter of 23 September 2009[3], the International Dockworkers Council filed a complaint with a detailed description of the measures that allegedly constitute State aid.

(4) By letter of 14 October 2009 the Commission requested information from Greece on the alleged State aid measures. By letter of 12 November 2009 the Greek authorities asked for a delay extension on which the Commission agreed in its letter of 18 November 2009. The Commission sent a reminder concerning this request on 3 February 2010 and on 23 February 2010 the Greek authorities responded to this request for information.

(5) On 5 May 2010 the Commission services met the representatives of the Greek authorities to discuss additional clarifications.

(6) The Commission requested additional information from the Greek authorities by letter dated 27 October 2010. The Greek authorities asked for a delay extension by letter dated 18 November 2011 that the Commission accepted by letter of 2 December 2011. The Greek authorities responded to this request for information on 8 February 2011.

(7) By letter dated 11 July 2012[4], the Commission informed Greece that it had decided that the differences between the concession agreement and the contract notice, as well as the fiscal measure related to the exemption from corporate income tax for goods, works and services provided to PCT outside Greece do not constitute State aid. It has also decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of all the other alleged State aid measures.

(8) The Commission decision to initiate the procedure was published in the Official Journal of the European Union on 5 October 2012[5]. The Commission invited interested parties to submit their comments on the measures.

(9) The Commission received comments from the beneficiary on 5 November 2012. These comments were forwarded to Greece on 14 January 2013, which was given the opportunity to react. Its comments and additional information were received by letters dated 2 November 2012, 27 March 2013 and 10 July 2013. On 13 September 2013 a meeting took place between the Commission services and the Greek authorities accompanied by the beneficiary. On 23 October 2013 the Greek authorities submitted additional information. The Commission sent a reminder for information that was still missing on 17 January 2014. The Greek authorities replied on 4 February 2014 and another meeting took place on 10 February 2014. Following this meeting, the Greek authorities provided additional information on 10 March 2014 and another meeting took place on 12 March 2014. Following that meeting the Greek authorities submitted supplementary information on 31 March 2014, 16 April

[3] Registered by the Commission the same day.

[4] Commission decision of 11 July 2012 C(2012) 4217 final, in case SA. 28876 (C (2012/C) (ex CP 202/2009) – Greece- Container Terminal Port of Piraeus & Cosco Pacific Limited, OJ C 301 of 5 October 2012, p. 55.

[5] Cf. footnote [4].

2014 and 28 April 2014. Additional meetings with the Greek authorities and the beneficiary took place on 19 May 2014 and 8 December 2014.

2. Description of the beneficiary and the alleged aid measures

2.1. The Port of Piraeus

(10) The Port of Piraeus is divided into two areas: the commercial port and the passenger port. The commercial port has 3 terminals; the container terminal, the cargo terminal and the automobile terminal.

(11) The container terminal has two piers. Piraeus Port Authority ("PPA") decided to expand the infrastructure of the container terminal with the extension of Pier I, the upgrade of equipment of Pier II and the construction of Pier III.

2.2. The Piraeus Port Authority S.A.

(12) The company, Piraeus Port Authority S.A. was established by law 2688/1999, through conversion of a body governed by public law, Piraeus Port Authority created in 1930, into a public utility company.

(13) On 13 February 2002 a 40 year concession agreement was signed between the Greek State and PPA. This agreement was ratified by law 3654/2008. According to this agreement, PPA has the exclusive right of use and exploitation of land, building and infrastructure of the port land zone of the Port of Piraeus[6]. In particular, the concession agreement provides for the right of PPA to sub-contract the operation of part of the port to a third party against payment[7].

2.3. The concession agreement between PPA and PCT and the investment project

(14) With the purpose of conceding Piers II and III, PPA conducted a European public tender[8] for port management services. In this tender PPA received two applications from COSCO and from a consortium of companies consisting of Hutchinson Port Holdings L.T.D., Hutchinson Ports Investments S.A.R.L., Alapis Joint Stock Company S.A. and Lyd S.A.

(15) The call for tenders provided for appeal procedures. However, no appeal was submitted to the judicial authorities concerning the tendering procedure or the final result by any of the participants. In addition, the procedure and the draft agreement were checked and approved by the Greek Court of Auditors.

---

6 See Article 1.1 of the concession agreement concerning its scope, and Section 3 on the right of use and exploitation.

7 See Article 3.1.iii of the concession agreement.

8 Published in the Official Journal. Reference 2008/S 20-026332 from 30.01.2008, amended with Reference 2008/S 54-072476 from 18/03/2008, extending the deadline for submission of tenders until 19.5.2008.

(16) In November 2008 PPA signed with PCT a concession agreement through which PPA conceded to PCT the exploitation and exclusive use to of the so-called "New Container Terminal (NCT)", comprising of the existing Pier II, to be upgraded, the new Pier III, to be constructed, and the area adjacent thereto, as well as the use of the adjacent berthing manoeuvre sea area, which allows the safe mooring and service of ships.

(17) According to the concession agreement PCT has the obligation to upgrade the existing Pier II, construct the new Pier III and provide the whole range of port services related to the operation of the container terminal. Furthermore, the concession holder will finance entirely at its own expenses all upgrades of Pier II as well as the construction and operation of Pier III. Therefore, the tender as well as the concession agreement foresaw that the concession holder will not receive any public money for its investments.

(18) In addition, it is foreseen that the concession holder assumes all (commercial) risks in respect of the upgrades and construction of the necessary infrastructure. It also undertakes a number of obligations in respect of ensuring a guaranteed capacity of the New Container Terminal.

(19) The concession agreement between PPA and PCT was ratified by Law 3755/2009 ("the Law"). Article 1 of the Law incorporates the concession agreement as it was signed, while article 2 sets out specific tax exemptions for PCT and article 3 provides for the possibility that PCTs investments related to the concession agreement benefit a specific protective regime of foreign investments set out in legislative decree 2687/1953.

3. Grounds for initiating the formal investigation procedure

(20) The Commission decided in its decision of 11 July 2012[9] that the differences between the concession agreement and the contract notice, as well as two fiscal measures[10] do not constitute State aid. In the same decision, the Commission expressed its doubts and opened the formal investigation procedure as regards other alleged State aid measures:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of pier III[11];

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of "investment good" for

[9] See Commission decision C(2012) 4217 final, OJ C 301 of 5 October 2012, p. 55.

[10] i) exemption from corporate income tax for goods, works and services provided to PCT outside Greece by companies or joint ventures installed outside Greece, on the condition that there is a bilateral fiscal agreement of avoidance of double taxation between Greece and the countries of registration, ii) refund of VAT within a period of 60 days from the period of the submission of the relevant application and interest rate applicable for computation of interests in case the State does not refund VAT credit within 60 days from the submission of the relevant application.

[11] Article 2§1 of the Law.

the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request[12];

3. Loss carry forward without any temporal limitation[13];

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III[14];

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project[15];

6. Exemption from taxes, stamp duties, contributions and any rights in favor of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom[16];

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code[17];

8. Protection under the special protective regime for foreign investments[18].

9. Exemption from the general rules of forced expropriation.

(21) In particular, the Commission took the view that the measures in question confer a selective advantage to PCT, as they constitute a derogation to the normally applicable taxation rules that cannot be justified by the economic policy considerations the Greek authorities invoked. In particular the Commission considered that the objective of fostering the investments undertaken by big infrastructure projects is an economic policy consideration that is extrinsic to the taxation system at stake and cannot justify the differentiated treatment in favour of PCT.

(22) Furthermore, the Commission considered that the fact that some of those or similar tax exemptions were included in previous public contracts on which the Commission adopted positive decisions is not relevant for demonstrating that these measures are justified by the logic of the Greek fiscal system.

(23) Moreover, the Commission raised doubts as regards the compatibility of the measures at stake with article 107(3)(a) and 107(3)(c) TFEU, argued by the Greek authorities. In particular the Commission raised doubts concerning the application of Article 107(3)(a) TFEU, as the conditions of compatibility of this Article have been developed by the Commission in its Guidelines on

12 Article 2§3 and §4 of the Law.
13 Article 2§5 of the Law.
14 Article 2§6 of the Law.
15 Article 2§8 of the Law.
16 Article 2§9 of the Law.
17 Article 2§10 of the Law.
18 Article 3 of the Law.

national regional aid for 2007-2013 and the Greek authorities provided no relevant argumentation as regards the conformity of the measures with the conditions of these Guidelines. Concerning the applicability of Article 107(3)(c), the Commission expressed its doubts as regards the necessity and proportionality of the measures.

4. Comments from interested parties and Greece

(24) Greece and the beneficiary submitted joint comments in this case. The Commission received no comments from any other third party after the opening of the formal investigation procedure.

4.1. As regards the existence of State aid

Absence of an advantage

(25) The Greek authorities and PCT argue that an exemption from a generally applicable tax rule does not necessarily confer an advantage which is selective, and that the Commission does not make a difference between the existence of selectivity and that of an advantage. Thus even when a selective measure is identified, it cannot be said that it automatically confers an advantage and vice versa. The application of the same general rule to different situations could give rise to discrimination or to a disadvantage for certain persons which are subject to this rule. The exemption may aim at ensuring that objectively different situations are treated differently and thus neither discrimination nor inadvertent disadvantages arise.

(26) Moreover they argue that in the same way as undertakings entrusted with the performance of services of general economic interest, the undertakings entrusted with long-term concessions to create and operate public infrastructure through private funds assume contractual obligations to invest significant sums of money for infrastructure that will be returned to the State at the end of the concession period. Thus the tax measures in question are meant to compensate for the "structural disadvantages" these companies have. For this they refer to the Combus judgment[19], where the General Court stated that removing a "structural disadvantage" does not amount to the grant of an "advantage" caught by Article 107(1) TFEU.

Absence of selectivity and/or justification by the logic of the tax system

i. Concerning the "system of reference" of the measures under examination

(27) According to the Greek authorities and PCT, the correct system of reference is the general regime applied to public infrastructure projects in Greece, including Private Public Partnerships. This scheme applies to all undertakings engaging in big infrastructure projects and public/private partnerships and does not differentiate between them. The fiscal provisions of Law 3755/2009 represent the individual application of this general scheme.

[19] Case T-157/01, Danske Busvogmaend v. Commission, [2004] ECR I – 917.

(28) As these projects have special characteristics[20] that distinguish them from other projects, the undertakings responsible for public infrastructure projects are objectively in a clearly different legal and factual situation when compared with other undertakings engaged in other types of activity. Thus the generally applicable tax rules cannot be considered as the valid "system of reference". The correct system of reference is the one that has taken into account these characteristics also recognised by EU legislation[21] which calls for special treatment[22].

(29) Thus the mechanism set up by Greece to ensure the appropriate treatment of the particular characteristics of public infrastructure projects, which distinguish them from other activities, is the introduction of certain fiscal provisions clarifying the rules applying in certain areas of taxation, the application of which i) could otherwise lead to discrimination against public infrastructure projects, ii) is characterised by lack of clarity and consistency with the general principles of the tax system or iv) is outweighed by the above mandatory requirement in terms of ensuring the most efficient use/allocation of public resources.

(30) Furthermore, they indicate that the legislative technique used in introducing a tax measure does not determine the general nature of a measure. By making reference to the Gibraltar judgment[23], they argue that the introduction by a Member State of an exemption to generally applicable rules does not automatically give rise to selectivity and an advantage. Merely following a "derogation-based" approach would be a formalistic methodology that would be easy to circumvent.

ii. Objective of the measure concerned

(31) The Greek authorities and PCT argue that in the light of the Adria-Wien case law, the objective of the measure under which the provisions in favour of PCT have to be assessed consists in the promotion of the successful implementation of public infrastructure projects. They refute the Commission's assessment in

---

20 i) long term nature of the contracts, ii) need for very significant upfront investment, which practice means reduced or no revenue during the initial period, iii) need to secure external funding, iv) uncertain nature of financial returns, v) general public interest in the creation of new public infrastructure, vi) strong and public interest in the successful and profitable completion of the project.

21 Regulation (EU) No 670/2012 of the European Parliament and of the Council of 11 July 2012 amending both Decision No 1639/2006/EC establishing a Competitiveness and Innovation Framework Programme (2007-2013) and Regulation (EC) No 680/2007 laying down general rules for the granting of Community financial aid in the field of trans-European transport and energy networks, OJ L 204, of 31.07.2012, p. 1, and Regulation (EC) No 1370/2007 on public passenger transport services by raid and by road, OJ L 315, of 3.12.2007, p. 1.

22 In particular they mention that the PSO Regulation 1370/2007 recognises that were justified by the need to ensure the tax benefit or full capital amortisation in relation to exceptional infrastructure, rolling stock or vehicular investment, a public service contract may have a longer duration than is normally allowed.

23 Joint cases C-106/09 P and C-107/09 P, Commission and Kingdom of Spain (C-107/09 P) v. Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland, [2011] not yet published, paragraphs 90-92.

the opening decision as to the "irrelevance" and "invalidity" of this type of objective.

(32) They also refer to the objective pursued by environmental levies, in order to argue that the Commission's conclusion in the opening decision has as a consequence that any tax measure with a specific objective other than the collection of tax revenue could never be justified by the nature of the general tax system. Member States are free within the limits of compliance with EU law to pursue the policy they deem appropriate through their tax systems.

(33) Moreover, they argue that the Commission was wrong to conclude that the said objective of the tax system is "irrelevant"[24], as the Court in the Azores case[25] did not state that the objective is without importance. Under the selectivity analysis the aim is not to determine whether or not the "objective" of the measure under examination "alone" is "valid" or "relevant". The "objective" of the measure consists in "the basis" upon which the comparison of the "legal and factual situation" of companies can be made.

(34) They argue that the Commission does not explain why the policy "objective" is not "valid" or "relevant" for the purposes of the selectivity assessment. For this they refer to the Adria-Wien[26], Regione Sardegna[27] and British Aggregates[28] judgments arguing that the Court did not pronounce itself against these objectives, but simply assessed whether the measures at stake were selective.

iii. PCT's legal and factual situation in light of the objective of the measure concerned

(35) The Greek authorities and PCT argue that in light of the objective of the successful implementation of public infrastructure projects PCT and the other undertakings assuming big infrastructure projects are in a different legal and factual situation than other undertakings. On this basis, they argue that the Commission has overlooked in its opening decision the circumstances/particular characteristics of these projects. The tax treatment accorded to PCT and others in comparable situation cannot give a competitive advantage over other undertakings which do not receive such treatment, since the two types of undertakings do not compete in respect of the performance of the public infrastructure projects concerned.

(36) All the undertakings which are implementing such projects are equally subject to this scheme and no one is to be excluded, and there are no limitations set as regards the region or sector of application, budget or time limits. Thus there is no de facto selectivity.

---

24 Recital 115 of the opening Commission decision.
25 Case C-88/03, Portugal v. Commission, [2006] ECR I-7115, paragraph 81.
26 Case C-143/99, Adria-Wien Pipeline, [2001] ECR I-8384.
27 Case C-169/08, Presidente del Consiglio del MInistri v. Regione Sardegna, [2009] ECR I-10821.
28 Case T-210/02 RENV, British Aggregates Association v. European Commission, [2012].

(37) Moreover, the Greek authorities have not retained any discretionary power as to how to apply these fiscal provisions that have been systematically introduced in all public infrastructure projects for several years.

iv. Logic of the tax system

(38) The Greek authorities and PCT argue that the fiscal provisions in question and the scheme of which they are part are consistent with the basic or guiding principles governing the relevant Greek tax rules, since they (a) are intended to pursue a public policy objective consistent with the basic principles of the general tax system, in particular the principle of proportionality, the economy and the revenue raising objective of the tax system and key policies of Greece regarding the creation of public infrastructure, (b) aim to ensure that objectively different situations are treated differently, thus applying the principles of equality and proportionality and ensuring that the results intended by the tax system are not distorted, (c) are applied upon the basis of objective criteria :, (d) are designed specifically as the legislative mechanism addressing key financial concerns arising in the implementation of public infrastructure projects, which risk jeopardising the private sector participation[29].

(39) Moreover by providing legal certainty through these provisions, and thus by safeguarding the ability of the taxpayer to pay tax, private sector investment in public infrastructure and thus the extension of the tax base and the collection of increased tax revenue is promoted. Thus the relevant measures are justified by the logic of the system.

Absence of an assessment regarding the conditions relevant to distortion of competition and effect on trade

(40) The Greek authorities and PCT argue that the Commission failed to identify the services and geographic markets which are relevant to the competitive assessment, did not analyse the conditions of competition in the relevant markets and did not establish that the competing EU ports mentioned in the opening decision are actual or potential competitors of the Port of Piraeus and PCT.

(41) They further argue that the Commission failed to examine the relevant market in which PCT's container terminal operates as well the competitive conditions in the relevant market. Such examination would demonstrate that the fiscal provisions at stake do not have an adverse effect on competition and trade in the EU.

(42) Concerning the competitive conditions in the market, they argue that on the basis of the WAM judgement[30] the mere fact that there is container cargo traded between EU Member States and that there are various ports which compete with each other on the provision of container port facility services does not automatically mean that any aid given to a port operator meets the

[29] See for example the General Court's analysis in this respect in case T-210/02 RENV, British Aggregates Association v. European Commission, [2012], paragraphs 83-91.

[30] Joint cases T-304/04 and T-316/04, Italy and WAM SpA v. Commission, [2006] ECR II-64.

criterion on effect on trade and/or distortion of competition set out in Article 107(1) TFEU. Thus they argue that the Commission did not analyse the effect of the fiscal provisions on competition and trade in the relevant markets.

(43) PCT provided more detailed comments as regards the above argumentation.

Definition of the relevant market

(44) Concerning the definition of the relevant market, PCT refers to Commission decisions in the area of mergers[31] in order to argue that there are two distinct relevant markets for container terminal port services; hinterland traffic and trans-shipment traffic.

(45) It also argues that concerning the hinterland traffic, the Commission in its opening decision appears to consider that the geographic scope of the market encompasses "Greece and Eastern Mediterranean", without explaining why it defines it differently than the Hellenic Competition Commission, which ruled that the geographic scope of the market for stevedoring services as regards hinterland traffic is limited to Central and Southern Greece[32].

(46) Moreover, PCT argues that both from a supply and demand side perspective, the Central and Southern part of Greece constitute a geographic market which is distinct from the Northern part of Greece, due to: a) the capability of PCT's container port terminal to handle a far greater volume of traffic than the Thessaloniki port and any other Greek port, and under more competitive terms given its greater technical capacity, b) the concentration of industry, commerce and the population principally in the wider Athens area and generally the central/southern part of the country, c) the topography of Greece which dictates the additional cost of transporting container traffic between the Thessaloniki port in the northern part of Greece and the central and southern parts of the country and vice versa.

(47) Concerning the transhipment container services, PCT refers to the Maersk/ECT and Hutchinson/Evergreen Commission decisions where the Commission identified as relevant geographic market for the transhipment container services, the Eastern Mediterranean and Black Sea area. It also considers that the Commission in its opening decision considers the geographic scope of the market as encompassing "Greece and the Eastern Mediterranean".

---

[31] Cases COMP/M.5398 - HUTCHINSON/EVERGREEN, COMP/M.5450 - KUHNE/HGV/TIU/HAPAG-LLOYD, COMP/JV.55 - HUTCHINSON/RCPM/ECT, COMP/JV.56 - HUTCHINSON/ECT, COMP/M.3863 – TUI/CP SHIPS, COMP/M.5398 – HUTCHINSON/EVERGREEN, COMP/M.3576 – ECT/PONL/EUROMAX, COMP/M.3973 – CMA CGM/DELMAS, COMP/M.3829 MAERRSK/PONL, COMP/M.1674 – MAERSK/ECT, IV/M.831 - P&O/ROYAL NEDLLOYD.

[32] Case 409/V/2009, Decision of 23 January 2009, at page 22.

Competitive conditions in the relevant market

(48) As regards trans-shipment traffic, PCT argues the PCT container terminal does not compete with EU ports on the provision of stevedoring services for deep-sea container trans-shipment traffic in Eastern Mediterranean, other than PPA's Pier I container terminal. Moreover it argues that the Commission did not explain why it considers that there are various ports in EU Member States[33] in this market that compete with PCT's container terminal port. According to PCT the Commission's statement that "*...the Port of Thessaloniki, the Port of Costanza in Romania, the Port of Koper in Slovenia and a number of ports in Italy may be considered as direct competitors*" contradicts the Commission's findings in case C 21/2009[34]. The ports of Italy and the port of Koper in Slovenia are not located in the Eastern Mediterranean segment of the market that the Commission identified according to PCT, but rather in the Central Mediterranean one. Moreover, trans-shipment traffic destined for the hinterland covered by these ports ("catchment area") is not handled presently through Piraeus port[35].

(49) From a supply side perspective, PCT argues that these ports could be considered to some extent as substitutes for PCT's container port terminal, as they could service some of the types of container ship that the PCT container port could service, but not all, due to the fact that they have a smaller sea depth and crane capacity[36]. From a demand side perspective, these ports cannot be considered as substitutes for the Piraeus port, as: (a) Piraeus offers the shortest and cheapest[37] deviation from the Suez/Gibraltar axis which represents the principal deep-sea container shipping lines in the Mediterranean Sea[38], (b) Piraeus offers the lowest bunker oil prices at a worldwide level, (c) Constanza in particular would involve additional costs of pilots in Dardanelles and Bosporus.

(50) In view of the above, PCT argues that the ports mentioned in the opening decision cannot be considered as actual or potential substitutes for the PCT

---

33 Port of Thessaloniki, Port of Costanza in Romania, port of Koper in Slovenia and a number of ports in Italy (cf. footnote 173 of the opening decision).

34 Commission decision of 18.12.2009 on case C 21/09 (ex N 105/2008, N 168/2008 and N 169/2008) – Greece – Public financing of infrastructure and equipment at the Port of Piraeus, OJ C 402 of 29.12.2012, p. 25.

35 Due to: the distance of Piraeus from these areas; the lack of modern railway link and services; the additional significant cost which would be involved; and the arrangements of the major deep-sea container shipping lines which serve the Central Mediterranean area through container port terminals in Malta (e.g. Maersk), Taranto (e.g. Evergreen), Venice (e.g. MSC) and Gioia Tauro (e.g. MSC)

36 For example Koper offers a sea depth of approximately 9 metres as opposed to 15-19 metres offered by Piraeus (which normally requires well above 12 meters for the ships it services). 13500 TEU container ships call on Piraeus container port every week which could not be serviced by any of these ports.

37 The additional journey significant cost involved in carrying trans-shipment traffic to any of the other ports would make these ports unattractive for this type of traffic.

38 The two – way distance of Piraeus from this shipping line is for a normal deep-sea vessel only approximately 16 hours sailing time, as opposed to 44 for Thessaloniki, 120 hours for Koper and several days for Costanza (due to the need to travel through the Dardanelles and Bosporus and the traffic congestion problems there).

container port as regards the provision of stevedoring services for trans-shipment traffic in the Eastern Mediterranean.

(51) In addition PCT refers to the Commission decision relevant to investments in the port of Piraeus, where the Commission considered that the competition between specific ports and the Port of Piraeus is insignificant[39]. Moreover, it argues that the Commission failed to analyse the effect of the fiscal provisions on competition and trade in the relevant markets. Moreover the assessment of this effect would require an examination of the equivalent tax systems applying within the relevant markets as other ports may benefit from similar or equivalent fiscal provisions.

(52) It also argues that PCT only faces competition in the markets concerned from PPA, which operates the Pier I container terminal at the Piraeus port. However as regards PPA, the Commission has recognised that the concession to PCT will increase competition for stevedoring services for container traffic in the port of Piraeus[40].

(53) As far as the potential competitors that may result from the privatisation of PPA and other Greek ports, PCT argues that the Greek port operators that are not entrusted with a similar concession are not in a similar position, thus no competitive advantage nor a distortion of competition arise from the fiscal provisions at stake.

(54) It also argues that the Commission does not refer to any evidence that other port operators would be interested in undertaking a major investment to establish a major container port terminal in Greece. According to PCT it is highly unlikely that such competition would arise, since no other existing port in Greece would combine Piraeus characteristics[41].

(55) Finally as regards competition from PPA, it argues that the Commission's view is inaccurate, as PCT already faces competition from PPA's Pier I container terminal and the effect of the concession is the opening of the market to competition and not a distortion of competition. In this respect it also argues that PPA benefits from certain legislative provisions of fiscal nature, in the light of which the adoption of some of the fiscal provisions as stake was seen as a necessary mechanism for ensuring that PCT was not put in a competitive disadvantage.

---

39 According to § 117 of the Commission decision: "*The only EU ports which form part of the Eastern Mediterranean Sea market are the ones situated on the Black Sea (such as Constanza in Romania, Varna in Bulgaria). However, due to the special situation of the straits connecting the Black Sea with the Aegean Sea54, the Black Sea ports are not the main competitors of the Port of Piraeus. Similarly, even though it cannot be fully excluded that other EU ports, such as* the Adriatic ports of Italy and Slovenia, may also be in competition with the Port of Piraeus, the competition between them and the Port of Piraeus is insignificant".

40 §§ 114 and 115 of Commission decision in case C 21/2009 mentioned in footnote 4.

41 (i) its location amidst Greece's biggest urban area of more than 5 million people, the biggest industrial/commercial area with the best rail and road links available in the country, (ii) extensive berthing space, storage facilities, and a large anchorage, (iii) the biggest sea depth, (iv) the closest distance to the Suez/Gibraltar axis, (v) one of the most competitive bunker oil markets worldwide, (vi) extensive ship repair facilities and the broad range of services required by ship operators.

4.2. On the comparison of the alleged State aid measures with similar provisions in other contracts of big infrastructure projects[42]

(56) The Greek authorities and PCT indicate that similar provisions to those of Article 2 and 3 of the Law were included in the Greek laws that ratified several individual public infrastructure projects as well as Law 3389/205 concerning Public Private Partnerships. As the Commission examined those laws under Article 107(1) TFEU and decided that they did not give rise to State aid, a conclusion that the fiscal provisions in favour of PCT constitute a selective measure and confer an undue advantage falling within the scope of Article 107(1) TFEU would jeopardise legal certainty and would be contrary to the Commission's practice and previous statements concerning the application of such provisions to public infrastructure projects in Greece.

(57) Concerning the Athens International airport case[43], where the Commission considered that the fiscal provisions applied in respect of airport services that were not liberalised at the time, they argue that the same conclusion can also be drawn for port infrastructure services in the current case. Moreover the Greek authorities retain their argumentation that the Commission examined the said provisions in that case.

(58) Concerning the Athens Ring Road case[44] and the Rio Antirrion Motorway Bridge case, according to them the Commission examined carefully the public and private sector financial contributions to the costs of the project as well as the fiscal provisions concerned. The Commission then concluded that the amount of the public sector contribution (in the form of grants and State guarantees) was determined as "market price" (i.e. the lowest amount of the public sector contribution required) through an open, non discriminatory and competitive tender. In the Athens Ring Road decision the Commission concluded that the fiscal provisions constituted a clarification of the applicable tax regime, the absence of which could risk jeopardising the success of the project and did not consider them as part of the remuneration of the concessionaire. Any financial value that might be associated with the application of the fiscal provisions adopted could not have been considered as part of the public sector contribution, since it could have been determined with accuracy only upon the expiry of the concession period. These provisions were only the necessary clarifications so that private investors would not be discouraged in particular as regards this type of non-viable construction projects of high risk. Thus PCT cannot be distinguished from the concessionaires in these cases, as these provisions were in all cases a

---

42 Commission decisions in cases N 508/2007 Ionia Odos, N 45/2008 – Motorway Elefsina-Korinthos-Patras-Pirgos-Tsakona, N 566/2007 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/2007 Central Greece Motorway, N 633/2007 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzona Motorway concession contract, N 134/2007 Thessaloniki Submerged Tunnel concession contract, N 462/99 Attiki Odos, NN 143/1997 Rion Antirrion Motorway Bridge, NN 27/1996 Spata International Airport.

43 Commission decision in case NN 27/1996 Spata International Airport.

44 Commission decisions in cases N 462/99 Attiki Odos and NN 143/1997 Rion Antirrion Motorway Bridge.

"clarification" and not a "remuneration" as the Commission considered in its opening decision.

(59) Moreover, the case law[45] the Commission mentions in its opening decision as regards the fact that its silence of the Commission on specific measures does not mean that they have been approved[46], cannot be applied in notified cases as the ones invoked by the Greek authorities and PCT.

(60) Concerning the subsequent State aid decisions on the rest of the infrastructure projects, the Commission did not need to refer in detail to the fiscal provisions in question because it did not change its position expressed in Rion Antirion Motorway bridge and Athens Ring Road cases[47].

(61) They argue that the issue that arises is whether in the light of the Commission's approval in the above past decisions, the fiscal provisions at stake can be considered as consistent with State aid rules and not whether these provisions are concerned by the Commission's past assessment, as indicated in the opening decision. Moreover, had these provisions been included in the tender documents of this concession, the Commission would have concluded the same as in the past Commission decisions.

(62) They also argue that the distinction made by the Commission in its opening decision between the current case and the previous cases is based upon a technicality, i.e. the adoption of the fiscal provisions in Law 3755/2009 as opposed to including them in the concession contract. Furthermore it indicates that: (i) the bidders of the tender were aware of the application of these fiscal provisions as the standard framework used by Greece for public infrastructure projects and in respect of PPPs in Greece; (ii) PCT contacts in respect of the Piraeus and Thessaloniki container port concessions were carried out at the level of Greece's Prime Minister and Minister of Shipping who were promoting these project to investors at international level and were offering the full package of measures that Greece has in place for public infrastructure projects financed by private sector resources; (iii) PCT was aware that the Commission had examined and has raised no objections of all such previous projects; (iv) PCT requested from the Greek government and PPA during the tender procedure that these provisions be included in the concession contract; (v) PCT raised this issue again with the Greek Prime Minister and Minister for shipping and once again received reassurances that such legislation would be introduced; (vi) in the light of these reassurances and throughout the tender and the preparation of its offer, PCT took into account that the concession contract would be operated on the same basis as all other public infrastructure concessions and that therefore, lenders would be familiar with the concession terms.

---

45 Joint cases T-427/04 France v. Commission and T-17/05 France Telecom v. Commission, ECR [2009] II-0435, paragraphs 264-266, C-474-09 P to c-476/09 P, Territorio Historico de Vizcaya, not yet published, paragraph 70.

46 See recital 221 of the opening decision.

47 In the same line of reasoning, the Commission also approved a scheme on broadband infrastructure in rural areas (SA. 32866 (2011/N) that had as legal basis Law 3389/2005 concerning PPPs that contains fiscal provisions similar to those of law 3755/2009.

(63) Therefore, the tender process for the award of the concession contract to PCT cannot be distinguished from the past cases, as the standard fiscal framework for big infrastructure projects was known to all bidders. They indicate further that there was no particular reason for keeping record of such exchanges in the context of the tender process since PPA does not have the power to adopt such provisions and at any case their application was a matter of established practice in Greece in line with the Commission's precedent.

(64) Thus, if the Commission relies on a technicality as the sole reason for distinguishing PCT from all undertakings carrying out public infrastructure in Greece, this formality would be contrary to the principle of legal certainty and legitimate expectations.

(65) Concerning the Commission's statement that "*the evidence provided by the Greek authorities reinforces the finding that the bidders did not take the specific advantages into account...*"[48], PCT argues that it is not aware of the evidence mentioned and that the adoption of these provisions through the law ratifying the concession contract does not amount to any evidence.

4.3. On the compatibility of the alleged State aid measures

(66) The Greek authorities and PCT argue that in case the Commission concludes that the fiscal provisions at stake give rise to State aid, such aid should be considered compatible with the internal market on the basis of Article 107(3)(a) and 107(3)(c), in view of the importance of the relevant investments, infrastructure and services for the economic development of Greece and, in particular, for the development and modernisation of the sea container transport sector.

(67) The investment project at stake aims at developing Piraeus Port as modern sea container terminal in the Mediterranean Sea, with more capacity and storage space, enhancing its performance in handling sea container traffic more efficiently. The performance data relevant to the operation of Pier II[49] already demonstrate the accomplishment of this objective. Moreover, the project aims at the Commission's objective of common interest in relation to EU transport policy, as this has been analysed in different EU regulations and communications.

(68) The acquisition of equipment and the construction of Pier III are considered as initial investment under the relevant EU regional aid rules concerning the application of Article 107(3)(a) TFEU. They correspond to EUR […][*] million and have created around 900 direct and indirect full-time jobs that will remain

[48] See recitals 225 and 226 of the opening decision.

[49] In 2012 a) the traffic in the Pier II has increased by 76.5% as compared to 2011 (2.108 million TEU in 2012 as compared to 1.188 million TEU in 2011), b) the capacity was 700.000 TEU higher than what was foreseen in the concession contract, c) the revenues increased by 43% as compared to 2011 (from EUR 72.87 million to EUR 104.3 million). In 2012 PCT, TRAINOSE and Hewlett Packard signed an agreement due to which Hewlett Packard would channel its products through Greece to other neighbouring countries.

[*] Covered by the obligation of professional secrecy

for the 35 year concession period. Given the high investment amount, any possible aid amount would be well below the maximum aid ceiling of 30% which was applicable for the region of Attiki up to end of 2010 or the maximum aid amounts approved by the Commission in decisions relevant to port infrastructure[50]. Thus the aid measures consist the minimum necessary and appropriate measures for the support of such a big infrastructure project. PCT's own contribution to the project is well within the thresholds set out in the regional aid rules. Moreover any possible aid would be compatible with the common market on the basis of article 107(3)(a) TFEU on the same grounds as the aid to PPA approved by the Commission in case C 21/2009[51].

(69) In particular the aid can be considered necessary in light of the need for public funding for the development of port infrastructure during the financial crisis, in accordance with EU policy in this respect[52], as well as to ensure the clarity, flexibility and predictability of the applicable tax system to concessions as this one. As regards the necessity of the aid measures, they argue that the fiscal provisions ensured compliance with the private sector project finance arrangements and avoidance of default of the company to pay its loans and potential liabilities. Without these fiscal provisions, the project finance arrangements that PCT could have achieved would be materially more onerous, something that might have potentially jeopardised its bid or the implementation of the concession contract (market failure). In practice the fiscal provisions were necessary to ensure access of the concessionaire to the necessary funding from private sector funders[53]. Finally a cash grant instead of these measures would have been inappropriate and unnecessary incentive given the difficulty in calculating in advance with accuracy the funding requirements arising from this market failure.

(70) Moreover they argue that the measures have a clear incentive effect, as the commencement and implementation of the concession agreement and any investment works occurred after the adoption of these fiscal provisions. In light of the economic crisis and the lack of financial credit prevailing in Greece and worldwide in 2008/2009, PCT had an incentive to proceed with the implementation of the concession only after the adoption of the law.

---

50 Commission decisions in cases C 39/2009 – Latvia – Ventspills Free Port Authority (50% aid intensity), SA. 30742 Construction of Infrastructure for the Ferry Terminal in Klaipeda (65% aid intensity), SA 34940 (2012/N) Port of Augusta (68.87% aid intensity), N 649/2001 Freight facilities grant (94% aid intensity), C 21/2009 Public financing of infrastructure and equipment at the port of Piraeus.

51 See Footnote 34.

52 Regulation 670/2012 of the European Parliament and of the Council of 11 July 2012 amending Decision No 1639/2006/EC establishing a Competitiveness and Innovation Framework Programme (2007-2013) and Regulation (EC) No 680/2007 laying down general rules for the granting of Community financial aid in the field of the trans-European transport and energy networks, OJ L 204, 31/07/2012, p. 1.

53 For this they refer to the fact that the China Development Bank, one of PCT's creditors, waited for the adoption of the ratification law in order to sign its loan to PCT. Furthermore, they refer to an email the […] sent to PCT in January 2009 expressing its main concerns about the funding of the said concession agreement. According to this email the concession agreement did not provide protection against general or discriminatory change in law and they argue that this concerned the fiscal framework of the concession agreement.

Otherwise it could have abandoned the concession at the cost of just losing its bank letter of guarantee of EUR 5 million. The incentive effect was also proven by the by the fact that PCT had undertaken the risk of the entire funding of the project.

(71) They argue further that the estimates they provided[54] show that the fiscal provisions provide an amount between EUR […] million and EUR […] million[55] for the whole concession period, i.e. […]% to […]% of the total investment costs of EUR […] million, much lower than the aid amounts approved by the Commission in cases relevant to investments for ports.

(72) Moreover they argue that the ex-ante quantifications of the specific advantages were not necessary for their approval or for the implementation of the investment. According to them, this ex ante approach for the purposes of the assessment of article 107 TFEU of any alleged benefit which might be said to arise from any of the fiscal provisions is appropriate in line with settled case law[56].

(73) They also refer to certain Commission decisions[57] where the Commission approved non-notified State aid, by establishing the incentive effect and the necessary and proportionate character of such aid, in cases in which the aid had not been quantified upon an ex ante basis and/or could not be quantified

---

54 The estimates provided were based on a study produced by PricewaterhouseCoopers Business Solutions S.A. These estimates consisted in a comparison of the assumptions of Cosco's business plan at the time of the publication of the ratification law (March 2009) and the generally applicable provisions. From the result of this comparison they deducted the amount corresponding to the additional funding needs PCT would have in the absence of the fiscal measures. The amount deriving from these calculations was in the end calculated in discounted values (with the use of an annual discount rate of 9.0%, i.e. the discount rate used by PPA in discounting the minimum guaranteed concession fees offered by PCT during the tender, but also an annual discount rate of 4.47% of March 2009, i.e. reference rate provided in the Commission communication). Finally these calculations do not include the measures in articles 2.3, 2.5, 2.9, 2.10 and article 3 of the law.

55 In the worst case scenario.

56 For example, Case C-143/99 Adria-Wien Pipeline GmbH and Wieterdorfer & Peggauer Zementwerke GmbH v Finanzlandesdirektion für Kärnten, [2001] ECR I-8365, paragraph 41; Case T-335/08 BNP Paribas and Banca Nazionale del Lavoro SpA (BNL) v Commission, [2010] ECR II-3323, paragraph 204; and Cases T-425/04, T-444/04, T-450/04 and T-456/04, France, France Télécom, Bouyges SA, Bouyges Télécom SA and AFORS Télécom v Commission, [2010] ECR II-2009, paragraph 216.

57 Commission Decision in Case SA.21918 – France – Regulated electricity tariffs in France, OJ C398/2012, Commission Decision 98/353/EC of 16 September 1997 on State aid for Gemeinnützige Abfallverwertung GmbH (OJ [1998] L 159/58), Commission Decision C(2007) 134 of 24 January 2007 in State aid case NN 67/2005 – Lithuania – reduction of a profit tax rate for UAB "Bite GSM", Commission Decision 2003/227/EC of 2 August 2002 on various measures and the State aid invested by Spain in Terra Mítica SA, a theme park near Benidorm (Alicante) (OJ [2003] L 91/23), Commission Decision of 14 April 2010 in State aid case NN 30/2009 - Ireland – Hotel capital allowances for the Ritz-Carlton Hotel, Powerscourt, Co. Wicklow, Commission Decision 2003/590/EC on State aid which the UK is planning to grant to CDC Group plc (OJ [2009] L 159/11), Commission Decision 2009/476/EC on State aid implemented by Luxembourg in the form of the creation of a compensation fund for the organisation of the electricity market (OJ [2009] L 159/11), Commission Decision 98/212/EC on State aid granted by Italy to Enirisorse SpA (OJ [1998] L 80/32), Commission Decision of 1/3/2007 in State aid NN4/2007 – "Delitissue Sp. z o.o." under document C(2007) 769.

even at the time of the adoption of the Commission's final decision. Thus the calculation[58] of the financial benefit was not necessary for establishing incentive effect and proportionality.

(74) Finally they have indicated that none of the measures under examination have been applied in practice.

5. Assessment of the state aid character of the measures

(75) Article 107(1) TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States. Therefore, in order to determine whether the measures at stake constitute State aid within the meaning of Article 107(1) TFEU, all the following conditions have to be met. Namely, the measure has to a) be granted through State resources, b) confer an economic advantage to an undertaking, c) be selective, d) distort or threaten to distort competition and affect trade between Member States.

5.1. Notion of undertaking

(76) Based on Article 107(1) TFEU, State aid rules only apply where the recipient of an aid is an 'undertaking'. According to settled case law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed[59]. In addition, any activity consisting in offering goods and/or services in a given market is an economic activity[60].

(77) The Commission has already considered that the construction and operation of some types of infrastructure can be considered as an economic activity[61]. Moreover according to settled case law[62], the provision of infrastructure facilities to third parties against remuneration constitutes an economic activity.

(78) As PCT has upgraded the existing Pier II, constructed the new Pier III and provides the whole range of port services related to the operation of the

---

58 According to PCT's calculations, the impact of the adoption of the fiscal provisions on the real internal rate of return ("IRR") taken into account in PCT's Model Business Plan of March 2009 has been estimated at [...] basis points (i.e. [...]%) reflecting an increase in this IRR calculated in the absence of the fiscal provisions concerned of approximately [...]% (i.e. from [...]% to [...]%).

59 Joined cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.

60 Cases 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7, C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36, joint cases C-180/98 to C-184/98, *Rec.2000, p.I-6451.*

61 Decisions of the Commission in the following State aid cases: N 44/2010 – Public financing of port infrastructure in Krievu Sala, OJ C 215 of 21.07.2011, p. 21, paras 60-68; C 39/2009 – Public financing of port infrastructure in Ventspils Port, OJ C 62, of 20.03.2010, p. 7, paras 53-58, N 60/2006 – Port of Rotterdam, OJ C 196 of 24.08.2007, p. 1, paras 42-52; N 520/2003 Flemish ports, OJ C 176 of 16.07.2005, p. 12, paras 34-54.

62 See *inter alia* judgment of 24 October 2002, case C-82/01P Aéroport de Paris, ECR 2002, I-9297, as well as judgment of 24 March 2011 in Joint Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission and case T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt v. Commission, [2011] II-1311.

container terminal, it can be considered as an undertaking for the purposes of State aid rules. Thus PCT is subject to State aid rules.

5.2. State resources

(79) According to article 107(1) TFEU, an alleged State aid measure should be granted by a Member State or through State resources. The measure is decided by the State and imputable to the State. By allowing PCT to enjoy a specific tax treatment, the Greek State foregoes State resources that it would have obtained if it had not enacted the alleged advantageous fiscal provisions. Hence the measures at issue involve a loss of State resources and they can be considered as granted through State resources.

5.3. Existence of a selective advantage

(80) According to constant case law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage that it would not have obtained under normal market conditions, i.e. in the absence of State intervention[63].

(81) Only the effect of the measure on the undertaking is relevant, neither the cause nor the objective of the State intervention[64]. To assess this, the financial situation of the undertaking following the measure should be compared with the financial situation if the measure had not been introduced. The notion of aid encompasses not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect[65]. With regard to tax, the Court of Justice has made clear that a measure by which the public authorities grant certain undertakings a tax exemption which places the recipient in a more favourable position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU. Likewise, a measure allowing certain undertakings a tax reduction or to postpone a payment of tax normally due can amount to State aid[66].

(82) The measures under examination consist in exemptions or postponements of payments of the normal taxes or charges PCT would have to pay in the absence of the relevant provisions or in differentiated treatment allowing PCT to ensure a better cash flow during the first years of the construction phase (see hereafter the description of normal system of taxes or systems of reference). Thus through these measures the financial situation of PCT is improved as compared to its situation without the measures. Therefore they confer an advantage to PCT.

---

63 Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraph 60; Case C-342/96 Spain v Commission [1999] ECR I-2459, paragraph 41.

64 Case 173/73 Italy v Commission [1974] ECR 709, paragraph 13.

65 Cases C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 38; C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34 .

66 Case C-222/04 Cassa di Risparmio di Firenze and others, [2006] ECR I-289, paragraph 132.

(83) The existence of an advantage can be ruled out in the case where the undertaking in question provides services of general economic interest in compliance with the criteria established in the Altmark case law[67] or when the State's intervention has taken place in line with normal market conditions[68]. However these two case scenarios are not applicable in the current case.

(84) Concerning the 'structural disadvantage'' invoked by the beneficiary and the Greek authorities, the Commission first notes that in accordance with the Court's case law, the existence of a structural disadvantage is not relevant for excluding the existence of an advantage and thus of State aid[69]. In addition, the Combus case is not applicable in any case in the case under examination. In that case, Combus had indeed a structural disadvantage as compared to its private sector competitors and the measure in that case indeed ruled out the existence of an advantage. This was due to the fact that most of Combus' drivers had the status of officials which meant higher personnel costs than if it had employed drivers on a contract basis, as all the other bus operators. However, PCT does not have a structural disadvantage compared to its competitors, as the fact that it undertook to invest in a big public infrastructure project does not by itself constitute a structural disadvantage, but a private investor decision that was taken by its parent company Cosco within the context of its normal business activity. Thus the findings in the Combus case law are not applicable in this case.

(85) In particular as regards the measure relevant to the exemption from taxes, contributions and any rights in favour of the State or third parties on the contracts between the creditors, and in particular its' mother company Cosco, of the loan agreements under which are transferred the obligations and rights resulting therefrom[70], the Commission considers that this provision is equivalent to the granting of an insurance contract that the State grants to PCT's creditors for free. In essence, PCT's creditors, and in particular Cosco, may enjoy the immunity from the payment of any tax, contribution and any right in favour of the State or third parties that the Geek State may decide to impose in the future, without having to pay any compensation to the State for such immunity. Thus due to this measure Cosco is found in a more advantageous position than creditors of other investors, as it does not have to pay a premium to the State for such immunity.

(86) Given the nature of this measure that is foreseen to apply in case the State adopts generally applicable rules imposing indirect taxes for this type of transactions, in essence it foresees tax immunity in favour of PCT's creditors, in particular Cosco, as compared to the companies in the same legal and factual situation as other creditors of companies conducting investments. In case the State adopts generally applicable rules imposing indirect taxes on the

---

67 Case C-280/00 Altmark Trans [2003] ECR I-7747.

68 Case C-39/94 SFEI and Others [1996] ECR I-3547, paragraphs 60-61.

69 See joined cases C-71/09 P, C-73/09 P and C-76/09 P Comitato «Venezia vuole vivere», Hotel Cipriani Srl and Società Italiana per il gas SpA (Italgas) v. Commission, [2011] I-4727, paragraphs 92 and 94 to 96, and Order of the President of the General Court in case T-172/14 R Stahlwerk Bous v. Commission, paras 59 and 60.

70 Article 2§9 of the Law.

transfer of loan obligations conducted by companies, the creditors of all other investors will have to pay such indirect taxes in the case of transfer of such loan rights. On the contrary in the case of PCT the transfer of any right deriving from any loan financing its investment between its creditors and in particular Cosco, will not be subject to any such tax, without the State being compensated for the grant of such immunity. Thus the advantage in question is selective as it only concerns PCT's creditors, in particular Cosco, that transfer rights and/or obligations deriving from the loans relevant to the funding of the concession contract and PCT.

(87) To fall within the scope of Article 107(1) TFEU, a State measure must "favour certain undertakings or the production of certain goods" in comparison with others which, in the light of the objective pursued by that regime, are in a comparable legal and factual situation[71]. Hence, in principle, for fiscal measures, the Commission has to assess the material selectivity of the measure by means of a three step analysis.

(88) First it is necessary to identify the common or "normal" regime under the tax system applicable ("system of reference"). Secondly, it has to be assessed whether the measure constitutes a derogation from that system of reference insofar as it differentiates between economic operators, who in light of the objective intrinsic to the system, are in a comparable legal and factual situation[72].

(89) If such derogation is established, i.e. if the measure in question is prima facie selective, in a third stage, it has to be examined whether the derogatory measure results from the nature or the general scheme of the tax system of which it forms part and could hence be justified. In this context, according to the Court's case law, the Member State has to show whether the differentiation derives directly from the basic or guiding principles of that system[73].

(90) The Greek authorities and PCT have provided extended argumentation in order to argue that for all the fiscal measures the correct system of reference is the general scheme applied for big public infrastructure projects in Greece with the objective of facilitating their access to finance in view of the high risks these projects entail, and that it follows from the Gibraltar judgement[74] that the introduction by a Member State of an exemption to generally applicable rules does not automatically give rise to selectivity and an advantage.

---

71 Cases C-143/99 Adria-Wien Pipeline [2001] ECR I-8365, paragraph 41; C-308/01 GIL Insurance and Others [2004] ECR I-4777, paragraph 68; C-172/03 Heiser [2005] ECR I-1627, paragraph 40.

72 See, Cases C-143/99 Adria-Wien, paragraph 41, Case C-308/01 GIL Insurance [2004] ECR I-4777, paragraph 68, C-172/03, Heiser [2005] ECR I-1627, paragraph 40, C-88/03, Portugal v. Commission [2006] ECR I-7115, paragraph 54, T-233/04, Netherlands v. Commission, paragraph 86.

73 See, for instance, Case C-279/08P, Commission v Netherlands (NOx) [2011] ECR I-7671, paragraph 62.

74 Joined Cases C-106/09 P and C-107/09 P Commission and Spain v Government of Gibraltar and United Kingdom [2011] ECR I-11113.

(91) The Commission will first analyse whether such argumentation can be accepted as regards all the elements of the selectivity analysis, i.e. system of reference, objective of the system, comparison of comparable legal and factual situation in light of this objective and justification on the basis of this objective. Then it will proceed to the selectivity analysis of each measure separately.

i. Concerning the "system of reference" and its objective

(92) The reference system constitutes the framework against which the selectivity of a measure is assessed. It defines the boundaries for examining whether certain undertakings benefit from a derogation from the normal rules which together form that reference system and are therefore treated in an advantageous way compared to other undertakings subject to the general rules of the system.

(93) When establishing this reference taxation framework, its scope has to be determined in a consistent manner in order to avoid that objectives that are extrinsic to the system are taken as a basis for its definition. If the definition of the reference system was established in the light of the policy objective that Member States pursue in each case which is extrinsic to the logic of the taxation system, then all fiscal measures Member States put in place in order to promote certain sectors, activities or type of undertakings would in practice escape from the application of Article 107(1) TFEU[75].

(94) In the present case, the objective of facilitating companies engaged in big infrastructure projects by providing legal certainty and additional cash flow during the phase of construction, invoked by the Greek authorities and PCT, is a policy objective which is external to tax considerations and cannot be used for the purposes of the selectivity analysis. The characteristics of big public infrastructure projects are extrinsic to the tax system and cannot serve as a basis to determine the applicable system of reference. In any case, the fact that the Greek State adopts a specific law each time it wishes to allow a specific fiscal treatment to a specific company, cannot be considered as a general framework that the administration applies without discretion.

ii. PCT's legal and factual situation in light of the objective of the measure concerned

(95) Once the reference system has been established, the next step of the analysis consists of examining whether a given measure differentiates between undertakings in derogation from that system. To do this, it is necessary to determine whether the measure is liable to favour certain undertakings or the production of certain goods as compared with other undertakings which are in a similar factual and legal situation, in light of the intrinsic objective of the system of reference. However, for this purpose, external policy objectives cannot be relied upon to analyse the differentiated treatment of undertakings under a certain tax regime.

---

[75] See joint cases T-92/00 and T-103/00, Territorio Histórico de Álava - Diputación Foral de Álava, Ramondín, SA and Ramondín Cápsulas v. Commission, [2002] II-1385, paragraph 51.

(96) As regards the "horizontal" character of the argued scheme that is applicable to all undertakings implementing big infrastructure projects, it is settled case-law[76] that the fact that the number of undertakings able to claim entitlement under a measure is very large, or that they belong to different sectors of activity, is not sufficient to call into question the selective nature of that measure and, therefore, to rule out its classification as State aid[77]. Therefore the fact that companies undertaking big infrastructure projects may benefit from several fiscal exemptions, is not sufficient to exclude the selective character of the measures in question. On the contrary, the criteria according to which these companies get access to such exemptions may entail de facto selectivity[78].

(97) Therefore PCT's comparable legal and factual situation has to be examined each time in the light of the objective of the relevant tax system applicable and not on the basis of external policy objectives.

iii. Justification by the logic of the tax system

(98) A measure which derogates from the reference system, which is thus prima facie selective, may still be found to be non-selective if it is justified by the nature or general scheme of that system. This is the case where a measure derives directly from the intrinsic or basic guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system[79]. On the contrary external policy objectives which are not inherent in the system cannot be relied upon for that purpose[80]. Consequently tax exemptions which are the result of an objective that is unrelated to the tax system of which they form part cannot circumvent the requirements of Article 107(1) TFEU.

(99) In that respect, the European Court has established that even if a policy objective constitutes one of the essential objectives of the European Union, the need to take that objective into account does not justify the exclusion of selective measures from classification as aid[81]. The successful implementation of the big infrastructure projects and the legal certainty for the implementation

---

76 See case C-279/08 P, Commission v. Kingdom of the Netherlands, [2011], I-7671, paragraph 50.

77 Cases C-75/97 Belgium v Commission [1999] ECR I 3671, paragraph 32; Case C-143/99 Adria Wien Pipeline and Wietersdorfer & Peggauer Zementwerke [2011] ECR I 8365, paragraph 48; Case C- 409/00 Spain v Commission [2003] ECR I 1487, paragraph 48.

78 Joined Cases T-92/00 and T-103/00 Ramondin SA and Ramondín Cápsulas SA v. Commission [2002] ECR II-1385, paragraph 39: in this judgment the Court ruled that applying a tax measure only to investments exceeding a certain threshold meant that the measure was de facto reserved for undertakings with significant financial resources.

79 See for example Joined Cases C-78/08 to C-80/08 Paint Graphos and others [2011] ECR I-7611, paragraph 69.

80 See Joined Cases C-78/08 to C-80/08 Paint Graphos and others [2011] ECR I-7611, paragraphs 69 and 70; Case C-88/03 Portugal v. Commission [2006] ECR I-7115, paragraph 81; Case C-279/08 P, Commission v Netherlands (NOx) [2011] ECR I-7671; Case C-487/06 P British Aggregates v. Commission [2008] ECR I-10515.

81 See inter alia cases C-279/08P Commission v. Kingdom of Netherlands [2011] I-07671, paragraph 75, C-487/06 P, British Aggregates v. Commission [2008] I-10505, paragraph 92; C-241/94 *France* v *Commission* [1996] ECR I-4551, paragraph 21; C-342/96 *Spain* v *Commission* [1999] ECR I-2459, paragraph 23; C-75/97 *Belgium* v *Commission*, paragraph 25.

of these projects cannot be considered as an intrinsic objective of the tax system. Moreover, the Greek authorities and PCT have not proven how this objective is consistent with the principle of equality and proportionality of the general tax system, and in particular its revenue raising objective. The latter objective is hard to reconcile with the granting of tax reductions[82]. Nor can the key financial concerns of the companies implementing big infrastructure projects be considered as objectives that can justify a differentiated treatment for these specific companies and in particular for PCT.

(100) Therefore if the fiscal measures that will be examined below constitute selective measures, they cannot be considered as justified by the public policy objective put forward by the Greek authorities and the beneficiary.

5.3.1. Exemption from income tax imposed on interest accrued until the date of the commencement[83] of operation of pier III[84]

System of reference

(101) Under the Greek income tax system, in principle all profits of S.A., companies of limited responsibility and private capital companies established in Greece, that are generated in Greece and abroad, including those in the form of interest, are taxed[85] at the applicable rate in the financial year concerned and the remaining amount of profits after tax may be either distributed to shareholders, accumulated as reserves or incorporated/converted into equity capital through a capital increase. Once the amount of profits after tax is distributed to shareholders or incorporated/converted into equity capital, it is taxed again at the applicable rate in the financial year concerned[86].

(102) Consequently, the system of reference for the taxation of interests accrued until the date of the commencement of operation of pier III is the Greek corporate income tax system, in particular the taxation of companies on profits including those resulting from accrued interests.

Derogation from the system of reference

(103) The "accrued interests"[87] constitute a part of PCT's gross taxable income and would normally be subject to taxation. However, PCT is exempted from

82 See in this respect Joined Cases T-92/00 and T-103/00 Ramondin SA and Ramondín Cápsulas SA v. Commission [2002] ECR II-1385, paragraph 62.

83 Or until 31 October 2015 at the latest.

84 Article 2, paragraph 1 of law 3755/2009.

85 Articles 99§1, a) first indent in combination with articles 12§1, 105§1, b) and 109§1 of the Greek income tax code; this corporate income tax amounted to 25% in financial year 2010, 24% in financial year 2011, 20% in financial year 2012, 22% in financial year 2013, 26% in financial year 2014 onwards.

86 A withholding tax is applicable at that time, according to article 99§1, a) of the GITC.

87 According to the Greek authorities, the term "accrued interest" is used to describe the accounting method used to calculate the accumulation of interest, whereby interest accrues depending on cash flow dates and the amounts involved. In other words, "accrued interest" is the interest on a specific amount over a specific period of time (irrespective of whether the said interest is owing or due). According to the Greek authorities PCT normally expects to collect such interest in cash deposits with credit institutions.

income tax on accrued interest until the commencement of the operation of Pier III[88], a treatment that deviates from the system of reference, mainly the income tax on revenues under the Greek income tax code ("GITC"). PCT may be considered as being in a comparable legal and factual situation with all S.A that are taxed on their profits under the generally applicable framework. Therefore it can be concluded that it has been granted a selective advantage.

(104) According to the Greek authorities and PCT, Article 99 of the GITC foresees that income exempt from taxation is subject to corporate income tax at the time of its distribution or capitalisation. On this basis they argue that the provision at stake only allows a tax deferral to PCT, in the sense that once PCT will capitalise or distribute its profits, PCT will be liable to pay corporate income tax on its' profits as well as withholding tax on shareholders' dividends.

(105) The Commission notes that article 99§1, a), 3rd indent of the GITC states that for companies that are exempted from corporate income tax according to specific legislation (in this case the provision under examination), only the profits that are capitalised or distributed are taxed, after the corresponding corporate income tax is deducted from their value. Therefore this means that through this provision, PCT is not liable to pay income tax from interest accrued until its related income is capitalised or distributed or at the latest until the commencement of operation of Pier III. Thus the tax deferral only refers to the profits that may be distributed or capitalised. Due to this provision, PCT may use its' profits that derive from interest accrued until the commencement of operation of Pier III, in order to accumulate reserves without having to pay corporate income tax in this respect. Moreover as according to the Greek authorities there is no obligation under the Greek legislation to convert reserves into share capitals or to distribute profits, PCT may due to this provision enjoy a full tax exemption of its profits deriving from accrued interests generated in Greece and abroad[89]. In any event, a tax deferral constitutes a selective advantage to PCT.

(106) The Greek authorities and PCT indicate that PCT has to maintain significant cash deposits in order to finance the investments required during the construction phase and the period prior to the commencement of Pier III and that this exemption aims at facilitating these investments in public infrastructure. In this sense they consider that PCT is in a legal and factual comparable situation to all companies undertaking big investments in public infrastructure.

(107) However, the fact that the measure is available to all companies realising investments in public infrastructures does not mean that the measure is not selective. On the contrary, it is established that only a certain category of companies, those investing in public infrastructures, can benefit from the

[88] The tax exemption on accrued interests will apply for a period of time that may vary, depending on early or later completion of the works, but that has a definite end. According to article 12 of the concession contract, the commencement of the operation of pier III should be effected 48 months after the date of commencement of the construction and at any case not later than 31/10/2015.

[89] In case no treaty on avoidance of double taxation is applicable.

measure. Other companies which are not active in this sector of activity cannot benefit from the same measure. Moreover, as already analysed above[90] the policy objective of facilitating companies engaged in big infrastructure projects during the phase of construction cannot be considered as an objective inherent to a fiscal regime on the basis of which the comparable legal and factual situation of companies can be determined.

Justification by the logic of the tax system

(108) The Greek authorities and PCT indicate that the tax exemption on accrued interests is based directly on a general provision of the GITC[91] that includes amongst certain types of tax exempted income, "incomes exempted by virtue of a contract ratified by law". They argue that as the Greek legislator consistently uses this general exemption in order to introduce tax exemptions applying specifically to all large public infrastructure projects undertaken in Greece, the provision under examination does not introduce a special tax exemption. On the contrary, it forms part of a general scheme based upon the general tax system that aims at facilitating and supporting the implementation of large public infrastructure or investment projects. This provision has been applied consistently for all public infrastructure projects in order to ensure that companies undertaking such projects are not subject to discrimination or "structural disadvantage".

(109) It derives from the EU courts case law that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria[92].

(110) In view of this case law, it can be concluded that the alleged "general" provision allows full discretion to the legislator to exempt any income from taxation, in practical terms after the State has negotiated and concluded any kind of contract with any taxable person. Therefore in practice this "general" provision allows for exemptions which are not within the logic of the general taxation system, but within the logic of favouring the specific company with which a contract may be negotiated and concluded each time. Therefore, the alleged "general" provision of the GITC cannot be considered as forming part of the logic of the income tax system.

(111) As regards the justification of the measure as inherent with the public policy objective of facilitation of public infrastructure projects, the Commission considers that these arguments might not be taken into consideration when assessing the notion of aid.

(112) Therefore the Commission concludes that the measure constitutes a selective advantage in favour of PCT which is equal to the income tax which PCT

---

90 See recitals 95 to 97.

91 i.e. article 103 §1 ib).

92 Case C-241/94, France v. Commission (Kimberly Clark) [1996], ECR I-4451. See also recital 21 of the Fiscal Notice.

would normally have to pay on the accrued interests until the commencement of operations of Pier III.

5.3.2. Refund of VAT credit balance irrespective of the stage of completion of the contract object – "single investment good" – VAT refund within 60 days from application; interests due to delay[93]

System of reference

(113) According to the Greek VAT tax system, a taxable person is entitled to deduct input VAT that is directly linked to the realisation of acts that are taxable[94] or that are not taxable but give right to deduction. The deduction is granted for the part of goods and services that are indeed used for the realisation of acts that are subject to the tax. Furthermore, VAT credit resulting from the deduction of input VAT and output VAT in a given tax period is not refunded but is carried forward to the next tax period[95]. A refund is allowed if the company is not able to offset its VAT credit against output VAT over a 3 year period and upon completion of this period[96].

(114) The VAT credit may be refunded and not carried forward to the next tax period only under the exceptions set out in article 34 of the VAT Code. One of these exceptions concerns VAT that has been paid on "investment goods", as they are defined in the VAT Code[97], i.e. "*tangible goods, owned by the company and put by it on continuous exploitation, as well as the buildings and other kind of constructions that are constructed by the taxable company on estate property that does not belong to it, but of which it has the use on the basis of any legal relation, for a period of at least 9 years… Reparation and maintenance costs are not included in the value of the investment good*".

(115) According to Article 5 of Ministerial decision 1073/2004[98], in the foreseen exceptional cases[99], VAT credit may be refunded as follows: a) for the 1st VAT refund application, within 2 months from the application date; b) for the subsequent VAT refund applications above 6 000 euros: (i) 90% refunded within 1 month from the application date and ii) the remaining 10% within 2 months from the application date; c) for subsequent VAT refund applications of less than 6 000 euros, the entire VAT amount within 1 month from the application date.

(116) As the Greek authorities and PCT rightly point out, for the construction of immovable property, the refund of VAT credit is made after the commencement of the works and up to the amount that corresponds to the

93 Article 2, paragraphs 2 and 3 of law 3755/2009.
94 Article 30§1 of the VAT Code.
95 Article 32§3 of the VAT Code.
96 As there is a three year time limit for carrying forward a VAT credit balance.
97 Article 33§4 of the VAT Code.
98 As this decision stood at the time the ratification law was adopted.
99 Including the case when an investment good is concerned.

expenditure related to the works which have been performed and invoiced during each period for which VAT can be claimed[100].

(117) In particular as regards investment goods, the right to deduct VAT is decided definitely at the time the investment goods are put in use. Moreover, in order to avoid abuses in the VAT refund mechanism, if within 5 years from the realisation of the expenditure for the acquisition or the construction of an investment good, this good is not put in use, then the input VAT that has been deducted has to be returned to the State, as it is considered as not having been used for taxable acts[101].

(118) Finally according to the generally applicable framework, the interest computation on tax or unduly paid amounts refund starts 6 months after the first day of the month following the fiscal declaration of the taxable person[102]. Nevertheless, the Greek administrative courts have considered that this provision is not in conformity with the constitutional principle of equality of taxpayers[103]. Therefore they have set aside this provision by considering that the interest should be computed from the day the taxable person has filed an appeal against the tax authority's decision not to refund the claimed VAT credit[104].

(119) The Commission considers that these provisions constitute the system of reference on VAT credit refund in Greece.

Derogation from the system of reference

- Concerning the VAT credit refund irrespective of the stage of completion of the contract object

(120) According to Article 2, paragraph 3 of Law 3755/2009, PCT is entitled to VAT credit refund regardless of the degree of completion of the construction project or individual structures or parts thereof. Moreover according to the same article PCT does not lose its VAT credit refund right, in case it has not made use of the investment good within 5 years from the realisation of the related expenditure, although this would be the case according to the generally applicable rules.

(121) The Greek authorities and PCT argue that as all companies have the right to VAT refund once the relevant expenditure is performed and invoiced, the provision as regards PCT does not grant any additional advantage to it, as in

100 Article 2§7 of Ministerial decision 1073/2004.

101 Article 33§3 of the VAT Code. This 5 year restriction is not applicable to public utility companies.

102 Article 38§2 of law 1473/1984.

103 Judgments 1948/1992, 3035/1992, 1274/2002, 1207/2012, 1501/2012 of the Conseil d'Etat, as well as 222/2009, 223/2009 and 2141/2009 of the Administrative Court of Athens and 4793/2013 of the Administrative Court of Thessaloniki. This interpretation was based on the article 21 of regulatory decree 26-6/10-7/1944 (code of the State court's proceedings) according to which "the legally normal interest and the interest on late payments…starts from the moment the legal action is notified to the State".

104 According to the Code of fiscal legal procedure the taxable person may file an appeal within 20 days following the day the act is notified to it.

any case PCT would be entitled to VAT refund after the commencement of the works and not only when these works would be completed.

(122) On the basis of the additional information and explanations provided, the Commission has come to the conclusion that indeed PCT would have at any case the right to VAT refund after the commencement of the works on the project and up to the amount corresponding to the invoices issued. However, this right is definitely decided once the investment good is put in use. Given that PCT has the right to VAT refund irrespective of the completion of the investment project and at the same time does not lose this right in case it does not put the investment good in use within 5 years, as it should under the normally applicable rules, it enjoys a selective advantage.

(123) This advantage consists in the VAT refund that PCT is entitled to keep if 5 years after the realisation of the expenditure related with this refund, the project did not start, while other companies would have to pay back to the Greek State the VAT refunded in case of non-commencement of the project within 5 years (from the realisation of the related expenditure). It is recalled that, under the generally applicable rules, in such cases, the relevant acts (concerned by this expenditure) would not be considered any more as taxable acts (see recital 117 above). This means that, in similar circumstances, other companies would normally be prevented from using the VAT credit linked with these expenses to offset VAT due in a subsequent period. Therefore, the advantage that PCT enjoys from this provision is equal to the full amount of the VAT refund that it is allowed to keep (under this provision) if 5 years after the realisation of the related expenditure, the project did not start.

(124) The Greek authorities and PCT argue that this deviation is also applicable to public utility companies, as they are the ones who most of the times construct infrastructure projects that may take more time to be completed than this 5 year period generally applicable. According to them, the same line of reasoning stands also for PCT, who would construct a big infrastructure project that may need more time than 5 years. This is also why this provision has been inserted in all the other concession contracts related to big infrastructure projects. Therefore they consider that this deviation from the generally applicable rules is not an exception but a different application of the rules to different situations that are not comparable.

(125) The Commission considers that this deviation constitutes a selective advantage, as it allows PCT the flexibility to get access to VAT credit refund independently of when it will put in use the investment good, i.e. for an indefinite period of time. In this way, even if it never put in use the investment good, its right to VAT credit refund would never be decided definitely and adjusted accordingly, which in practice means that if it didn't complete the project, it would not be obliged to return the VAT credit that it received during the whole construction period. The fact that public utility companies might benefit from the same advantage does not mean that this advantage is not selective. Public utility companies constitute a category of companies which can benefit from the measure. Consequently, such a measure is selective.

- Concerning the definition of investment good

(126) Article 2, paragraph 3 of Law 3755/2009 foresees that for the purposes of the VAT code, the construction project of the concession agreement and any supply of goods, works, services and ancillary works related to the construction shall be considered as "single investment good". This provision states in essence that for the purposes of the concession agreement, the notion of "investment good" foreseen in the VAT code shall include all activities related to the object of the concession agreement, i.e. not only the "tangible goods"[105] constructed but also all provision of goods, works and services that are related or ancillary to the concession agreement object.

(127) The Greek authorities and PCT argue that in light of articles 34 and 33§4 of the VAT code relevant to the "investment good", the provision under examination merely consists in a clarification of the generally applicable rules in order to avoid mistaken application of the VAT credit refund rules by the tax authorities in view of the particularities and the high amounts involved in big infrastructure projects. According to them, in light of the specific characteristics of the concession agreement, the measure under examination has as a purpose to treat each element of the investment costs as a single business unit for the VAT purposes. As all expenditure related to the investment project is integrated in the investment good from an accounting point of view at any case, this provision only clarifies what is already applicable. As PCT has undertaken considerable investments that would include separate actions and stages and types of expenditure on goods and services, if each of these costs were treated separately, PCT would be treated differently for the purposes of the VAT regime from any undertaking investing in order to engage in an economic activity.

(128) To support their argumentation, the Greek authorities and PCT refer to the INZO case law[106], according to which the economic activities in the sense of the VAT directive "...may consist in several consecutive transactions and preparatory acts…"[107] that allow the relevant VAT credit refund during the construction period. Moreover they indicate that in the same line of reasoning the law on PPPs was amended in 2011[108] in order to foresee that PPPs are eligible to claim the refund of VAT credit each year upon the submission of their annual VAT return, without having to carry forward the credit balance to the next accounting period.

(129) Finally they argue that even if the investment was not considered as falling within the scope of the definition of "investment good", PCT would be entitled to claim the refund (i) upon an annual basis if it could establish that it would not be able to offset its VAT credit against output VAT over a three year period and (ii) upon the completion of three years.

---

105 As per the definition provided in article 33§4 of the VAT Code.

106 Case C-110/94, Intercommunale voor Zeewaterontzilting (INZO), [1997] ECR – I 870.

107 Paragraph 15 of judgment in case C-110/94.

108 See article 29(3) of law 3389/2005 as it was amended by article 18(2) of law 4013/2011.

(130) The Commission notes that the provision under examination includes a specific definition of the notion of "investment good" which is broader for PCT than for other companies that are in the same legal and factual situation. In practice this definition has as a consequence that PCT has the right to be refunded for VAT credit in respect of all works, services and goods related to the construction object, although according to the generally applicable rules this possibility would only exist for tangible goods and not for services, works, repair and maintenance costs. As according to the generally applicable rules PCT would be entitled to a VAT credit refund upon an annual basis by establishing that it would not be able to offset its VAT credit against output VAT over a three year period and upon the completion of three years, the broader definition of the single investment good for the purposes of the concession contract in practice results in granting to PCT additional cash in advance from VAT credit that would normally be refunded later[109].

(131) Indeed, thanks to this provision, PCT can get a tax refund not only for tangible goods but also for expenses relating to services, works, repair & maintenance, while other companies could for such expenses only offset input against output VAT or wait for 3 years to get a refund. Therefore, the advantage that PCT enjoys thanks to this provision is equal to the interests accrued on VAT refunded for all expenses other than for tangible goods (relating to the investment good), from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3 years later or up to the moment where PCT would have been able to offset its VAT credit (concerning these expenses) against output VAT.

(132) The fact that the tax authorities could possibly apply differently the VAT credit refund rules in the absence of this definition, demonstrates that this definition entails a selective advantage for PCT that is not applicable to all companies. Moreover the fact that the law on PPPs that is mainly applicable for infrastructure projects, was amended in order to foresee the right of PPPs to claim the refund and avoid VAT credit carrying forward to the next year, also proves that according to the generally applicable rules every expenditure related to an infrastructure project will not be treated as a "single investment good" for the purposes of the application of VAT credit refund rules. The letter of the Ministry of Mercantile Marine to the Ministry of Economic Affairs[110] requesting specific VAT credit refund arrangements[111] for PCT and the successful bidder of the Port of Thessaloniki at the time, demonstrates that the generally applicable rules related to refund would not be the same. Finally the fact that after the 2013 ministerial decision there is no differentiation in the refund rules irrespective of the definition of investment good, also

[109] It also entails the legal certainty that all type of PCT's expenditure will be treated in the same way, although this would not be the case under the generally applicable rules.

[110] This letter is dated 31.10.2008 and was submitted by the Greek authorities in the course of the procedure before the opening of the formal investigation procedure as Annex 2 of the submission dated 1 February 2011. It was registered by the Commission on 8 February 2011 with number 2011/013591.

[111] In particular they requested 90% VAT credit refund within 1 month from the application date and the remaining 10% within a year. This refund corresponds in essence to the refund applicable to investment goods.

demonstrates that this definition constituted a selective advantage in favour of PCT at the time it was granted.

(133) Moreover the Commission notes that the INZO case law mentioned refers to the right to deduct VAT for transactions subject to VAT that are related to the economic activity of the taxable person and not to the right for a refund.

- Concerning the computation of interests from the 1st day after the expiry of the 60 day deadline

(134) The provision under examination grants also PCT the right to interests from VAT credit against the State arising automatically once the 60 day deadline expires, without having to follow the procedural or temporal requirements set out by the general applicable framework related to the VAT credit refund, i.e. at an earlier stage than for other companies and without having to go through the administrative courts' procedure. Therefore it entails an additional selective advantage for PCT.

(135) This advantage consists in the interests which PCT can request (under this provision) from the Greek State once 60 days have passed from the moment it filed the relevant fiscal declaration (to request the VAT refund), while other companies in a similar situation would not be entitled to interests at the same point in time.

(136) The Greek authorities retain their argumentation that is supported by PCT by referring to the EU case law on VAT[112] which states that the refund of VAT credit balance constitutes the refund of resources of the taxable person and not State resources. They argue further that the 60 day time limit derives to the principle of neutrality and equality deriving from the EU VAT case law[113]. Where the State delays in refunding VAT credit balance beyond what it has established as a "reasonable period of time", it should be required to pay arrears interest by way of compensating the taxpayer claiming such refund. Thus the payment of this type of arrears interest on VAT credit balance does not constitute State resources.

(137) The Commission considers that the computation of interests in respect of the delay in the payment of the VAT refund implies State resources, as regards the additional interests the State will have to pay to PCT due to this provision. In practice due to this provision the State will pay interests automatically from the next day after the 60 day period and not from the date PCT would file an appeal in this respect, as it would be the case according to the applicable rules. As only PCT gets this right automatically although this is possible in general

---

[112] Cases T-68/03, Olympic Airways v. Commission, [2007] ECT II-2911, paragraph 361, C-25/07 Alicja Sosnowska v. Dyrektor Izby Skarbowej [2008] ECR I-5129.

[113] The obligation to refund VAT arises at the moment input VAT is paid and that the right to deduct VAT "*…is exercisable immediately…while the Member States have a certain freedom of manoeuvre in determining the conditions for the refund of excess VAT, those conditions cannot undermine the principle of neutrality of the VAT tax system by making the taxable person bear the burden of the VAT in whole or in part'… This implies that the refund is made within a reasonable period of time*. Case C-25/07 Alicjia Sosnowska, [2008] ECR I-5129, paragraphs 15-16.

only after the filing of an appeal, the provision entails a selective advantage for PCT.

(138) The Greek authorities and PCT argue that this provision merely ensures that the State does not obtain a financial benefit at the expense of PCT. In the case of concession agreements of this type a big delay in VAT credit refund would be a considerable expense and thus a serious structural disadvantage for PCT. Moreover the possible payment of smaller amounts of arrear interests to other undertakings does not reduce the cost that PCT should normally bear in its business activity. Thus PCT does not have any competitive advantage and is not treated differently than other companies.

(139) The Commission does not consider that PCT is in a different situation than other companies which would justify a different treatment. As already mentioned the fact that PCT realises a large investment does not constitute an argument regarding the notion of selectivity. Moreover, the automatic payment of interest to PCT reduces the normal costs of the company and gives PCT an advantage compared to other companies.

Justification by the logic of the tax system

(140) The Greek authorities and PCT argue that even if there was an element of selectivity in the provisions relevant to VAT credit refund, this would be justified by the basic or guiding principles which are inherent in the VAT system, as this has been confirmed by the EU and Greek courts.

(141) The Commission notes that in this case the measures in favour of PCT indicate that PCT was granted a favourable treatment as regards VAT refund as compared to other companies that conduct investments and deduct VAT and this cannot be considered as justified by the principle of neutrality or even more of equality of the VAT tax system.

(142) In particular as regards the VAT credit refund irrespective of the stage of completion of the contract object, even if it could potentially be accepted that a deviation would be possible due to a longer construction period, that can be anticipated in bigger projects, an indefinite duration of this deviation cannot be considered as respecting the principle of equality or of neutrality of the VAT system. In particular, as PCT under the terms of the concession contract was under the obligation to complete Pier II until 30.04.2014 and Pier III until 31.10.2015 at the latest, the said flexibility for an unlimited period of time cannot explain in which terms the comparable and legal factual situation of PCT is different from that of other undertakings that make investments and get a VAT credit refund. In light of the principles of the VAT system, according to which it has to be ensured that companies do not benefit from an undue advantage from the VAT system in place, such specific treatment cannot be considered as justified by the logic of the system.

(143) As regards the broad definition of the notion of investment good, the Commission notes that the VAT directive allows Member States discretion to decide whether the companies may get VAT credit refunds or whether they will carry the VAT credit forward to the next year, as well as how they will

define the "investment good" for VAT purposes. Thus the Greek State had the discretion to determine the rules applicable in this respect and specify in which cases a refund could be claimed and on which basis. However, the broad definition of the notion of investment good that allowed PCT a facilitated and earlier refund of VAT credit cannot be considered as justified by the logic of the tax system, as this would be contrary to the equality principle that should be applied to all companies that conduct investments and not only to PCT.

(144) Concerning the computation of interests after the 60 month deadline, the Commission considers that it cannot be justified by the logic of the Greek VAT system either. The general VAT neutrality principle may justify the imposition on interests in case of delay of the VAT refund, to oblige the State not to shift the burden of the VAT system to the taxpayer. The Greek provisions in this respect have been interpreted by the Greek Courts so that the taxpayer of any kind does not suffer the consequences of a possible inaction of the State. This interpretation was made independently of the amounts that the State has to return to the taxpayer. Thus the advantage that PCT derives from the provision under examination that is supposed to put additional pressure to the Greek State in case it does not refund VAT in time cannot be considered as justified in view of the high expenditure of its investment.

(145) Consequently, the Commission considers that the above mentioned measures concerning the conditions of refund of VAT provide a selective advantage in favour of PCT.

5.3.3. Loss carry forward without temporal limitation – Income tax (article 2§5 of Law 3755/2009).

System of reference

(146) According to the general applicable framework[114], for the purposes of calculating the income tax, the losses of one year for commercial activities and activities of a liberal profession may be carried forward for up to a maximum period of 5 years. The GITC does not foresee any exception in respect of this rule.

Derogation from the system of reference

(147) According to Article 2 paragraph 5 of Law 3755/2009, PCT may carry forward its losses without any limitation in time. This measure grants a clear selective advantage to PCT as it deviates from the generally applicable rule that has no exceptions under the GITC. Due to this provision PCT will be able to carry forward its losses to any time it will be more appropriate for its interests, mainly once the balance between its investment costs and its taxable income will change, i.e. when it will have high profits, in order to avoid paying taxes that it would normally pay in the absence of the benefit of this exception.

[114] Article 105§11 in combination with article 4§3 GITC.

(148) Therefore, this provision provides to PCT an advantage which is equal to the difference between the income tax that it actually pays and the corporate tax that it would have paid in the absence of the possibility to carry forward its losses more than 5 years after these losses occurred.

(149) The Greek authorities and PCT also argue that the right to carry forward losses for the duration of the concession in this case has been considered appropriate as an application of the income-expenses matching principle. According to the Greek authorities and PCT one of the basic principles of the GITC in this respect and has been applied as such in the general scheme of which article 2(5) forms part, which they consider should be taken as the system of reference.

(150) Moreover they argue that in long term concessions to construct and operate public infrastructure, there is a marked imbalance between the initial period of construction of the infrastructure and the subsequent stages of operation of the infrastructure where the infrastructure is expected to be profitable so as to cover initial losses. As the investments required up-front lead to significant losses over more than 5 years and they can only be offset at the later part of the concession period, the 5 year limitation would deprive the concessionaire of the benefit of the tax loss carry forward rule. In this respect, undertakings responsible for big infrastructure projects would be in a different situation from ordinary undertakings.

(151) The Commission considers that this derogation from the general rule cannot be considered as inherent in the logic of the Greek tax system. As the 5 year rule for fiscal loss carry forward is general and without any differentiations, the loss carry forward without any temporal limitation cannot be considered as justified for public infrastructure projects. The 10 year limitation that is now applicable for PPPs reinforces the conclusion that the indefinite period foreseen specially for PCT constitutes a clear selective advantage for it. Finally the Commission considers that all undertakings that conduct investments that may take several years are in the same legal and factual situation as PCT and the other concessioners in Greece, in light of the objectives of the General Income Tax Code. As the Greek tax system does not allow differentiations depending on the duration of the investments of undertakings but sets out this general 5 year rule for all, PCT cannot be considered as being different than other companies as regards this rule. As mentioned in point 107, a measure applicable to all undertakings responsible for big infrastructure projects is selective because it only applies to a limited category of undertakings.

Justification by the logic of the tax system

(152) The Greek authorities and PCT argue that a) the "objective pursued" for this measure should be the one pursued by the derogating provision, b) this provision aims at applying the income-expenses matching general principle of the tax system to the particular characteristics of the concessions, c) the application of this principle to these projects does not amount to a removal of the risk borne by the concessionaire but aims at ensuring equal treatment and removal of the "structural disadvantage" of these projects, d) this provision has

been consistently applied to all big public infrastructure projects in Greece, e) the possibility to carry forward losses over the duration of the concession is the appropriate mechanism in addressing the particular characteristics of such concessions and the objective difference between the concessionaire and other commercial undertakings.

(153) The Commission notes that the objective of the tax system has to be established at the level of the system of reference and not at the level of the exception measure[115]. If the measure itself constituted the reference system, then any fiscal measure would escape the classification of State aid no matter how exceptional it would be. The objective of the corporate income tax system is to generate revenue for the State budget and it would be jeopardised if specific companies were allowed to reduce their tax base when they see fit according to their financial interests. In addition the high investment amounts involved in big infrastructure projects does not mean that companies undertaking them are in a structural disadvantage that has to be corrected by the income tax system. All companies conducting investments have losses during the first years of the construction of their investment and they may not have revenues within the period of 5 years foreseen by the GITC. Such justification would not derive at any case from the principles of the Greek Income tax system. Moreover the fact that a similar provision has been applied for certain big infrastructure projects in Greece does not mean that the measure may be justified for PCT. Finally the alleged specific characteristics of big concessions cannot be accepted as a valid objective of the generally applicable rules relevant to fiscal loss carry forward, as explained above in recitals 98 to 100. Thus the Greek authorities and PCT have failed to prove that in light of the principles of the Greek income tax system the differentiation in favour of PCT can be justified.

(154) Consequently, the Commission considers that the selective measure under examination cannot be justified by the logic of the Greek tax system of reference described above.

5.3.4. Choice among three depreciation methods

System of reference

(155) The GITC foresees that for the depreciation of assets the general rule is the "fixed straight line method" of depreciation[116][117]. According to article 1

[115] Case T-55/99, Confederación Española de Transporte de Mercancías (CETM) v. Commission, [2000] II-03207, paragraph 53.

[116] With the fixed straight line method, depreciation is calculated on the basis of a fixed rate on the initial acquisition value or of the readjusted acquisition value plus the value of improvements or additional parts.

[117] At the time the provision under examination was adopted, Article 31.1.f) of the GITC foresaw an exception to this rule, relevant to the depreciation of new machinery and mechanical or technical equipment of industrial, mining, quarry and mixed enterprises of this kind. In these cases the companies could also use the declining balance depreciation method. This provision has been modified and now it only foresees the general fixed straight line method for all cases.

paragraph 2 of presidential decree 299/2003[118] companies are obliged to depreciate their fixed assets every year with the depreciation rates set out in this decree, independently if they make profits or losses during the depreciation period. Consequently if the depreciation is conducted with rates that are higher than the ones foreseen in the presidential decree, they are not taken into account for tax purposes.

(156) Especially in respect of concession contracts, reserves for recovery of assets that will return to the State or third parties[119] after a certain period of time on the basis of a contract are deductible from gross revenues[120]. According to Ministerial Decision 100/2005[121], reserves for recovery of assets that will be returned to the State or to third parties without compensation, are formed every year and for as many years as the work concession lasts. This reserve is deducted from gross revenue and is not formed out of the profits of the company. The company is not entitled to calculate the depreciations on the basis of presidential decree 299/2003, which is generally applicable, due to this specific provision, but also due to the fact that the work constructed by the company for exploitation does not belong to the company but to the State or the 3rd party. The deduction at stake is calculated independently of the existence of profits.

(157) Finally costs related to improvements and supplements on leased immovable property are depreciated in equal tranches over the period of the leasing, provided that the applicable depreciation rate is not lower than the rate set out in Presidential Decree 299/2003[122].

(158) Thus the general system of reference as regards this measure consists in the straight line depreciation method which is generally applicable, for the whole concession period, which is the time period determined for contracts under which the depreciated asset will be returned to the State or a third party.

(159) The Greek authorities and PCT argue that the provisions related to depreciation allow flexibility to choose between alternative depreciation methods and depreciation rates, in order to allow appropriate treatment of different circumstances. At that prospect, they refer to the possibility of industrial, mining, quarry and mixed enterprises of this kind to decide on the

---

[118] Presidential Decree 299/2003 relevant to the "Definition of highest and lowest depreciation rates". This decree sets out the range between the highest and the lowest depreciation rate per category of fixed assets. Taxable companies may choose any depreciation rate within this range. Once a company has chosen a depreciation rate within this range, it is obliged to complete the depreciation by applying the same rate on all assets of the same category which have been acquired by the company during the same fiscal period. For assets of the same category acquired in different fiscal periods, companies are entitled to use a different depreciation rate, but in any case it is mandatory to complete the depreciation procedure with the initial depreciation rate applied to all assets of the same category acquired in the same fiscal period.

[119] This kind of "reserves" does not constitute real asset of the company but depreciations of the fixed assets that will be returned to the State or to 3rd parties.

[120] Article 31.1.g) GITC.

[121] YA 100/2005 (YA 1003821/10037/B0012, OJ B 80 of 2005): Deductible costs from gross revenues of companies on the basis of administrative solutions and the case law.

[122] Article 31.1.l) of the GITC.

use of the straight line or the declining depreciation method. According to them, the choice of the depreciation method, as well as the choice of the depreciation rates, is at the discretion of the taxpayers. In line with these two methods and reflecting the principle of flexibility in this regard, they refer to the possibility of PPPs to choose between the straight line method applying for the whole life-period of the project and the 10 year straight line method with an option to select a longer depreciation period within one month from the completion of the project[123]. Finally they reiterate the argumentation provided before the opening decision, by indicating that the flexibility of this system is also shown by the fact that other companies awarded concessions of big public infrastructure projects in Greece have the choice between different depreciation methods.

(160) The Commission notes that the possibility for industrial, mining, quarry and mixed enterprises of this kind, to choose between two types of depreciation method would not apply to PCT because this possibility did not cover contracts through which the asset is returned to the state or a third party at the end of the contract.

(161) Moreover the fact that other companies might have benefitted from similar advantages does not mean that such advantages may constitute a system of reference. In particular, the fact that other companies awarded concessions of big public infrastructure projects in Greece have the choice between different depreciation methods only shows that the possibility is limited to a category of companies, those conducting big public infrastructure projects.

(162) Thus the Commission considers that the system of reference for this measure is the one determined above in recitals 155 to 156.

Derogation from the system of reference

(163) Article 2§6 of the Law under examination, provides to PCT the choice between 3 different methods of depreciation:

a. Fixed straight line method during the whole concession period.
b. Depreciation of the works' construction costs within 10 years from the moment of the completion of the works by yearly equal amounts[124]. In case PCT wishes to depreciate such costs within a longer period, it may do so, but then it would have to notify this to the tax authority within one month from the end of the fiscal year during which the work has been completed.
c. Depreciation of any amount up to 100% of its construction costs within 5 years from the commencement of the commercial exploitation of the

[123] Article 105(12) of the GITC as amended by law 4013/2011. This method is the one foreseen in paragraph 5 article 97 of law 1892/1990 for the construction of parking spaces.

[124] Method set out by law 1914/1990 for BOT projects. According to article 9§8 of law 2052/1992, works that are executed with total or partial funding provided by 3rds, the depreciation of the construction costs and of the interests on loans and credits during the construction period, that are considered as construction costs, is conducted according to the same method.

work[125]. For all the subsequent years, it may depreciate up to 50% of the non-depreciated construction costs of completed works irrespective of the time of completion. In case PCT wishes to use this method, it has to declare its intention to the competent tax authority at any time within 6 years after the commencement of the concession.

(164) PCT has been given the possibility to choose between the standard straight line generally applicable depreciation method and two other depreciation methods that are available to some of the big infrastructure projects in Greece. The provision allows PCT the right to choose depreciation methods that can entail an advantage as compared to the general system. If for instance PCT chooses one of the two accelerated depreciation methods, it will be able to reduce its taxable base to a larger extent and at an earlier stage than what it would do under the application of the standard straight line method. Moreover, the discretion granted to it to choose the 3rd depreciation method within 6 years from the commencement of the concession, in practice means that PCT may choose the way and the level up to which it will reduce its taxable base at a later stage, when it will be in a position to calculate more precisely its taxable revenues. Thus depending on its revenues at that time it may benefit from the advantage to lower its taxable profits and pay less taxes than what it would pay if it depreciated all its assets according to the generally applicable rules.

(165) The Greek authorities and PCT argue that the choice of the depreciation method cannot constitute an advantage since the benefit of the tax allowance remains the full depreciation costs and only the number of years during which it will be spread will be different.

(166) The Commission notes in this respect that the full depreciation of an asset at a shorter or longer period of time may lead to a differentiation of the company's financial result and taxable situation at a certain period of time and thus lead to a benefit. If for instance a company depreciates the total value of an asset in 10 years' time instead of 35 years' time, then it will be able to reduce its taxable base at an earlier stage. The value of the depreciated costs that will be taken into account in the first case will be higher than the value of the same depreciated costs in a longer time period. Thus the Commission considers that indeed the tax allowance remains the full depreciation cost but the way this depreciation cost is used for taxation purposes may result in an additional advantage for PCT that other companies do not dispose of.

(167) The Greek authorities and PCT mentioned that the flexibility inherent to the depreciation rules in Greece should encompass an entire range of options in order to allow appropriate treatment of different circumstances of public infrastructure projects, whilst ensuring full depreciation of the costs of the assets.

(168) However, the generally applicable rule of the fixed straight line method for concession contracts, i.e. for companies that are in the same legal and factual

[125] Method of depreciation for airport constructing companies set out by article 26 paragraph 8 of law 2093/1992.

situation, is clearly foreseen in the law and the "flexibility" related to the range of depreciation rates is not generally applicable to costs of concession contracts, but to other types of investment costs.

(169) The Greek authorities also argue that the Commission in its opening decision misinterpreted the additional flexibility awarded to PCT that does not automatically and necessarily involve an advantage. The workings of each depreciation method available and in particular the range of depreciation rates in each method in conjunction with the particular set of circumstances[126] mean that in principle it cannot be excluded that a similar outcome can derive through any of the alternative methods. Moreover the sole fact that an undertaking has more alternatives than another one does not automatically mean that an advantage arises. The existence of a competitive advantage or not could only be established upon the basis of an assessment of competitive conditions and the different outcomes that could arise in specific circumstances from the application of the alternative depreciation methods available to each competitor.

(170) The Commission considers that its reasoning in the opening decision[127] in this respect is in essence confirmed by the argumentation above. As each depreciation method involves different parameters that need to be examined in order to choose the most advantageous one, due to this provision, PCT has the freedom to make its calculations and choose between the different depreciation methods the one that suits more to its interests. In particular the fact that it can still within 6 years from the commencement of the project decide to change the depreciation method applicable, its margin of liberty is greater than the one of a normal operator[128]. Furthermore, as PCT may pick and choose the depreciation method it sees fit, by contrast to other undertakings that can only apply the normal depreciation rules for concessions, it certainly enjoys a selective advantage as compared to these companies. It is irrelevant in this respect to examine the competitive conditions and the different outcomes that could derive for the different competitors in the specific circumstances, as this is not the objective against which the comparable legal and factual situation of PCT has to be compared.

(171) Moreover the Greek authorities retain their initial argumentation as regards depreciation rules applicable to PPA and the Port of Thessaloniki[129], the two

---

126 e.g. asset value, profitability, business plan.

127 See recital 165 of the opening decision.

128 It is even greater than the one foreseen for instance for PPP's (this is without prejudice to the view the Commission may take on fiscal provisions relevant to PPPs).

129 The provision under examination helped to eliminate a gap in the general Greek tax system regarding the depreciation of assets used in the operation of a container port terminal, such as those that will be used by PCT for the purposes of the concession agreement. Article 34 of Law 2937/2001 lays down specific depreciation rates that PPA and the Thessaloniki Port shall use under the fixed straight line depreciation method, for the specific types of port asset that they use. The Greek authorities argue that these rates are not applicable to PCT. According to the Greek authorities, if PCT opted to apply the straight line method and was allowed to use these depreciation rates, the period of depreciation would exceed the concession period. On the other hand, if PCT were obliged to apply the straight line method with different depreciation rates than

other major ports of Greece, and insist on their opinion that the provision at stake ensures that PCT is not treated less favourably than those other two port operators.

(172) The Commission notes that in any case the fact that specific depreciation rates could have been applicable at the time for PPA and the Thessaloniki Port does not mean that PCT could be entitled to enjoy a specific treatment, nor that such specific treatment was justified. So the Commission considers that the provision under examination entails a selective advantage for PCT.

(173) This advantage consists in the possibility for PCT to choose between 3 depreciation methods and is equal to the difference between the income tax that PCT would have to pay if the fixed straight line method was applied and the income tax that it eventually paid by applying a different depreciation method.

Justification by the logic of the tax system

(174) The Greek authorities and PCT argue that a) the choice of alternative depreciation methods is part of the general scheme applied to all undertaking entrusted with public infrastructure projects in all sectors of the economy, b) there is no discrimination as concessionaires of big infrastructure projects are in a different legal and factual situation than other activities, c) the provision is consistent with its objective and available to all such companies, d) the considerations that are relevant are the objective pursued, the mechanism chosen and the principle of flexibility in the general asset depreciation system, e) in the absence of this provision there would be legal uncertainty as there are types of assets for which no depreciation rates are available, f) the essence of the provision is to allow greater flexibility to depreciate assets that are not covered by standard rates, due to the particularities of public infrastructure concessions, g) as this mechanism systematically applies to all public infrastructure concessions in all sectors, it is consistent with the relevant flexibility principle of the depreciation system, h) this mechanism is appropriate and proportionate as it applies the flexibility principle and there is no more suitable alternative to ensure such flexibility in depreciation given that the circumstances each undertaking faces at the time it selects its depreciation method cannot be known in advance, i) PCT has no special discretion other than that justified under the general principle of flexibility.

(175) First of all the Commission reminds that, according to standard case law, the Member State should provide the justification of selective measures[130]. The argumentation provided by the Greek authorities and the beneficiary does not establish how a measure that allows discretion to the beneficiary can be considered as justified by the logic of the tax system. Thus it retains its preliminary conclusions in the opening decision that this measure cannot be justified by the nature and general scheme of the system.

---

the ones applied for PPA and the Thessaloniki Port, it would be disadvantaged compared to these operators (recital 166 of the opening decision).

130 See case Portugal v. Commission, paragraph 81 in footnote 80.

(176) Moreover it notes that the flexibility allowing full discretion to the beneficiary to depreciate its assets, cannot be considered as a principle underlying the fiscal system that may justify the measure. In essence this would end up in considering that the measure itself is the general system and its mechanics would be the objective against which the measure can be justified. If this reasoning was applicable then any discretionary fiscal measure could escape the classification as State aid. Furthermore all the argumentation put forward as regards the fact that similar rules apply for other public infrastructure concession contracts in Greece cannot be considered as justifying the measure[131]. Therefore this measure constitutes a selective advantage that cannot be justified by the logic or general scheme of the system.

5.3.5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the financing of the investment project (article 2§8)

System of reference

(177) According to the generally applicable legislation, stamp duties are imposed on the written form of several acts of civil and commercial law, therefore including loan, credit and ancillary agreements. According to the presidential decree on stamp duties[132], stamp duties are collected in relation to a specific document setting out a transaction in writing. The stamp duty is related to the act itself; therefore it is up to the parties to agree on the party liable to pay it. However, in practice this means that for loan, credit and ancillary agreements, the borrower is mainly liable to pay the relevant stamp duties, as the creditor has the power to impose such payment. The introduction of the VAT as a general expenditure tax by law 1642/1986 in the Greek legal order had as a consequence the replacement of several stamp duties and turnover taxes by VAT[133].

(178) According to article 16 of law 1676/1986 and article 36 of law 3220/2004 are exempted from stamp duties the loan and credit agreements, as well as their ancillary agreements that are provided by Greek and foreign banks in Greece or that have a link to Greece, i.e. they are concluded and/or executed in Greece, they create obligations which are executable in Greece, they involve collaterals in Greece (territoriality principle)[134]. Thus according to the existing

131 See in this respect the Commission's assessment in recitals 98 to 100 above.

132 Presidential decree of 28-7-1931, OJ A 239 1931, as modified especially by law 2873/2000.

133 However, the introduction of the VAT did not affect the stamp duty imposed on loan agreements.

134 Under settled case law, a loan entered into outside of Greece through a private deed is subject to stamp duty in Greece where the loan is executed in Greece. "Execution in Greece" occurs where the delivery of the loan amount by the foreign lender to the borrower, who is located in Greece, occurs in Greece. "Delivery of the loan amount in Greece" occurs where the lender effectively puts the loan amount in the account of the borrower in a Greek bank (Opinion 964/1955 of the Legal Council of the Greek State, Court of First Instance of Thessaloniki 2123/1963, Tax Court of First Instance 2163/1967, Administrative Court of First Instance 6043/2001, Council of State 2996/1991 and 984/1992). Further, judgment 3639/2013 of the Conseil d'Etat ruled that "… *a loan agreement concluded through a private deed abroad, is subject to stamp duty, so far as it provides for obligations which should be executed in Greece, and such is the obligation of the borrower flowing from the said agreement to transfer in Greece, through his order to the foreign*

stamp duty code, loans that are given by undertakings other than banks are subject to stamp duty[135] unless they do not have a link with Greece or are issued as bond loans. Loans transferred between undertakings other than banks are also subject to stamp duty[136], if the principal loan was initially subject to stamp duty.

(179) The Commission notes that the stamp duty legislation includes several exemptions in particular after the introduction of the VAT system and/or the replacement of stamp duty by other charges or taxes. However, the general applicable framework for this measure remains the Greek stamp duty system, as it stood at the time the provision under examination was adopted. The existence of exemptions to this system does not mean that the stamp duty system does not exist, but that each exemption[137] has to be assessed on its merits.

Derogation from the system of reference

(180) As according to the generally applicable framework, loan, credit and ancillary agreements with companies other than banks that are contracted and executed in Greece or have a link with Greece[138] are subject to stamp duties, PCT would normally have to pay stamp duties for this kind of acts. However, on the basis of the provision under examination, PCT has been alleviated from stamp duties it would normally have to pay for this type of acts. PCT has been alleviated from stamp duties it would normally have to pay for loans with any kind of companies other than banks, and in particular from its parent company Cosco[139].

(181) In this way, PCT would enjoy a selective advantage in comparison to other undertakings in a comparable legal and factual situation. This advantage is equal to the stamp duty that PCT would normally have to pay under the generally applicable rules.

(182) The Greek authorities and PCT do not question that these loan transactions are exempted from the payment of stamp duty that would normally be due. However, they argue that this exemption provides PCT with greater flexibility regarding the funding required for the performance of its concession obligations without any additional cost, in case such flexibility is deemed necessary in exceptional circumstances. They also refer to the fact that PPA also benefitted from this exemption in the context of its concession to manage the Piraeus port. Thus this measure should be considered as part of a general

---

bank, the agreed loan amount which was deposited by the lender abroad on [the borrower's] name.".

135 At the rate of 2.4%.

136 Again at the rate of 2.4%.

137 The Commission's assessment in this case is without prejudice to the position it may take outside this procedure on the exemptions.

138 As described in footnote 134 above.

139 The Greek authorities and PCT refer to two loans of EUR 54.8 million and EUR [...] million that PCT concluded with its parent company, Cosco, in order to start its investments in the port of Piraeus.

measure inherent in the Greek tax system, which aims at facilitating the funding of big infrastructure projects.

(183) However, as already stated above for the other measures, facilitating the funding of big infrastructure constitutes an element to take into account when assessing the possible compatibility of State aid but not the existence of State aid.

(184) Moreover the Greek authorities and the beneficiary argue that the two subordinated loans of EUR […] million and EUR 54.8 million that Cosco granted to PCT in order to start its investments in the port of Piraeus were not subject to stamp duty according to the generally applicable rules, as (a) they were executed outside Greece, (b) they were paid into a bank account of PCT opened with a bank outside Greece, (c) they were repaid by PCT through a money transfer from its bank account outside Greece. For this they provided a report of the regular tax audit of PCT's fiscal year confirming this exemption.

(185) The Commission first notes that the fact that PCT did not pay stamp duty in the transactions above does not prove that according to the generally applicable rules it would not pay either. The report of the tax audit provided makes specific reference to the provision under examination. Moreover the transactions at stake are perfectly identical to a similar transaction on which the Administrative Court of Appeals in Athens considered[140] that the territoriality principle of the stamp duty code[141] was violated. In particular in that case the loan agreement was entered into by a company based in Greece as the borrower and a foreign company based outside Greece as the lender. The loan was signed outside Greece. The lender deposited the loan amount in a bank account of the borrower outside Greece, and following the deposit the foreign bank was under the obligation to transfer the loan amount to the bank account of the borrower in Greece the same day. The Administrative Court of Appeals considered that this loan had the same legal results as if it was signed in Greece and as if the loan amount was transferred directly in Greece without the intermediation of the foreign bank and therefore it was subject stamp duty.

(186) The same case scenario applies also to the loans that Cosco granted to PCT. In particular, the loan agreement was signed outside Greece, the loan amounts were deposited in PCT's account in HSBC of Luxembourg on 21.04.2009 and on 22.04.2009 they were transferred to the account of PCT in HSBC in Piraeus. According to the submissions of the Greek authorities PCT used EUR 50 million plus VAT as letter of guarantee that PCT had to provide to PPA for the entry into force of the loan agreement[142]. Thus the factual circumstances of the loan agreement involved in the case above, are equivalent to the ones of the loan agreements between Cosco and PCT. In particular although the loan was signed outside Greece and deposited in a bank account outside Greece, it was then transferred to PCT's account in Greece so that it uses it for the purposes of the concession agreement in Greece. Thus, according to the

140 Decision 617/2006 on the interpretation of article 8 of the Stamp Duty Code.
141 Article 8 of the Stamp duty code. See case law on this in footnote 134 above.
142 In accordance with article 3.1 of the concession contract.

territoriality principle enshrined in article 8 of the Stamp duty code as interpreted by the Greek Courts, the loan agreements in question should have been subject to the payment of stamp duty according to the generally applicable rules. Thus the Commission considers that PCT has already benefited from a concrete financial advantage due to this provision that does not constitute the application of the generally applicable rules but a derogation to them.

(187) The Greek authorities and the beneficiary argue that this Court decision is not applicable in the case of PCT as the factual circumstances of this case differ from those of PCT's loan agreements. They argue that PCT could have used these loan amounts outside Greece for its purposes. Moreover they argue that this decision has been appealed in front of the Greek Supreme Administrative Court and the Greek administration applies an interpretative circular[143] according to which such a transaction would not be subject to stamp duty. This circular is of general validity and binding for the Public Administration. Thus the non-payment of stamp duties in these two transactions does not constitute a deviation from the generally applicable rules.

(188) The Commission notes that an interpretative circular on the application of the stamp duty code cannot be considered as of higher validity than Court decisions. The fact that the decision of the Administrative Court of Appeals of Athens has been appealed does not mean either that this decision is not applicable. Moreover the interpretation of the principle of territoriality as described above[144] by the Greek courts is in the same line as the said decision. The Commission further notes that the facts relevant to PCT's loan agreements are the same and therefore it can be concluded that under the normally applicable rules as interpreted by the Greek courts, PCT would have to pay the relevant stamp duty. Given this interpretation the provision under examination clearly grants a selective advantage to PCT.

Justification by the logic of the tax system

(189) The Greek authorities argue that this exemption is consistent with the general scheme of the progressive phasing out of stamp duty where the legislator decides that the exemption from stamp duty is an appropriate mechanism for ensuring that objectively different situations are treated differently for tax purposes. To this effect, this exemption applies to all undertakings implementing public infrastructure projects. As a mechanism addressing their particular characteristics it is also proportionate as it does not risk jeopardising stamp duty revenue, given that several other alternative types of transactions, also exempt from stamp duty, can in any event be used by such undertakings.

(190) The Commission notes that the progressive phasing out of stamp duty cannot apply as principle of the stamp duty system that justifies this measure, as such phasing out could only be envisaged as regards all loan agreements and not just the ones of PCT. As regards the particular characteristics of public

[143] Interpretative circular 1027/1990.
[144] See footnote 134.

infrastructure projects, the Commission refers back to its analysis in recitals 98 to 100 of this decision. Thus the Commission concludes that the Greek authorities and PCT failed to prove that this selective measure is justified by the logic of the tax system.

5.3.6. Exemption from stamp duties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom (article 2§9).

(191) According to the existing stamp duty code, loans transferred between undertakings other than banks are subject to stamp duty[145], if the principal loan was initially subject to stamp duty.

(192) The Commission considers that the provision of Article 2.9 above entails a direct advantage in favour of PCT's creditors, among which, is its parent company Cosco. This advantage is equal to the amount of stamp duty that PCT's creditors would normally have to pay, under the generally applicable rules, in case of transfer of a loan relevant to the concession agreement contracted with PCT. This provision also involves an indirect advantage in favour of PCT to the extent that it could make it easier for PCT to get a loan.

(193) According to the Greek authorities, Cosco has given two loans to PCT in 2009 which according to the Greek authorities and PCT were paid out in 2011. Due to the provision under examination, Cosco who is the parent company of PCT could benefit from an exemption from stamp duty in case it transferred these loans to other undertakings. According to the Greek authorities and PCT these loans have already been paid out by PCT. On this basis, the Commission has no reason to believe that such a transfer took place. However this provision may entail a selective advantage for Cosco or other creditors of PCT.

(194) The argumentation provided by the Greek authorities and PCT as regards this stamp duty exemption is the same as regards the stamp duty exemption for loans in favour of PCT. On this basis, the Commission concludes that its reasoning developed under that exemption is also valid for this measure. Thus this measure is selective and cannot be considered as justified by the nature or the general scheme of the system.

5.3.7. Exemption from stamp duties for any compensation paid by PPA to PCT under the concession agreement, which is outside the scope of the VAT code (article 2§10).

System of reference

(195) Concerning this measure, the system of reference is the stamp duty regime applicable to acts of civil or commercial law in Greece. The rules governing this regime are already mentioned in recitals 177 and 179 of this decision. According to stamp duty rules, stamp duties are imposed in relation to the legal documents to which they are attached and not the specific taxable

[145] Again at the rate of 2.4%.

persons that sign these documents. According to Ministerial Circular 44/1987[146] which interprets the stamp duty provisions after the changes introduced with the VAT regime, contracts, legal acts or transactions subject to VAT are not subject to stamp duty.

(196) Moreover pursuant to the generally applicable law as interpreted and enforced by the competent Greek tax authorities, the payment of compensation falls outside the scope of VAT and is therefore subject to stamp duty[147].

(197) According to the same circular, the activation of an ancillary agreement (collateral, guarantee, mortgage, penal clause and every other type of security) related to a contract that is subject to VAT and thus exempted from stamp duty, is not subject to proportional stamp duty. However, when the main contract is subject to VAT or is subject to a fixed (and not proportional stamp duty) the activation of an ancillary agreement to this contract is subject to a fixed stamp duty.

(198) Finally the payment of other types of compensation, as for instance for damages or international breach of contract, is subject to stamp duty.

(199) The Greek authorities indicated that according to the provisions of the Greek Stamp Duty Code, compensation paid in Greece due to damages is subject to stamp duty at a 3.6% rate. The payment of compensation pursuant to an indemnity clause included in a contract is subject to stamp duty at a 2.4% rate.

Derogation from the system of reference

(200) Article 2§10 of the ratification law foresaw that any type of compensation that PPA would pay to PCT by virtue of the concession agreement that is outside the scope of the VAT code, is exempted from stamp duty.

(201) Given that according to the generally applicable framework the stamp duty is imposed on the legal documents and not specifically on the parties of the transaction and given that PPA was exempted from stamp duty by law[148] at the time of the adoption of the ratification law, each time a compensation payment on behalf of PPA in relation to the concession contract would be outside the scope of the VAT code and would be subject to stamp duty, PCT would be obliged to pay it under the generally applicable rules. In particular due to this provision, PCT would be exempted from the payment of a fixed stamp duty in

---

146 Article 3 of Ministerial circular 44/1987: Implementation of the provisions of imposition of stamp duties to various contracts and acts.

147 Under article 57§1 (b) of law 1642/1986, transactions that are subject to VAT under article 2 of the same law, as well as their ancillary agreements, are exempt from stamp duty. Under article 2 of the Greek VAT Code (Law 2859/2000 replacing Law 1642/1986 that introduced VAT in the Greek legal order), VAT applies to the supply of goods and services where such supply is effected for the payment of consideration. According to the prevailing interpretation of these provisions, the payment of compensation does not fall within the meaning of the provision of services against remuneration and thus falls outside the scope of VAT and instead is subject to stamp duty.

148 Pursuant to Article 2 of Law 2688/1999, in conjunction with Article 362 of Law 1559/1950. The Commission's position in this decision is without prejudice to any position it may take in the future regarding this provision.

the case of the activation of a penalty clause of the concession contract, as well as in case PPA would pay compensation due to damages related to the concession contract or breach of the concession contract. Moreover as the Greek authorities and the beneficiary indicate, given that PPA was exempted at that time from the payment of stamp duty in respect of transactions concerning the implementation of works on its behalf by 3rd parties, due to this provision, PCT would also be exempted from the payment of stamp duty arising from its arrangements with PPA subject to stamp duty. Thus the exemption at stake has the effect of exempting PCT from the obligation to pay stamp duties in such cases, clearly entailing a selective advantage for PCT.

(202) The Greek authorities and PCT argue that where the payment of compensation has a causal link with a contract which falls within the scope of the VAT regime pursuant to an indemnity clause ("penal clause") contained therein, it is exempt from stamp duty. This is because such an indemnity clause is considered as ancillary agreement exempt from stamp duty where the principal agreement falls within the scope of VAT. As the concession contract is subject to VAT any payment under a penal clause provided for in the concession contract is exempt from stamp duty according to the generally applicable rules.

(203) The Commission notes that indeed according to the generally applicable framework no proportional stamp duty is imposed on the activation of a penalty clause of a contract subject to VAT. However in such cases a fixed stamp duty is imposed according to the same circular invoked by the Greek authorities. Therefore in case PPA would have to pay compensation due to the activation of a penalty clause of the concession contract, due to the provision under examination, PCT would not pay the fixed stamp duty that would be applicable. Therefore the provision entailed a selective advantage in favour of PCT.

(204) The Greek authorities and PCT also indicate that the payment of other types of compensation, i.e. for damages or international breach of contract, is subject to stamp duty. In this sense, Article 2§10 introduces an exemption concerning these other types of compensation. However according to them this exemption is part of the general scheme which aims at addressing objectively different characteristics/particularities of public infrastructure concessions. Thus no genuine differentiation and no selectivity arise in this respect.

(205) The Commission notes that the Greek authorities and PCT confirm its finding that in the cases where PPA would pay compensation to PCT due to damages related to the concession contract and/or any breach of it, PCT due to the provision under examination, would not pay the stamp duty it should normally pay. Therefore, this provision provides to PCT an advantage which is equal to the stamp duty that it would have to pay in such circumstances and from which it is relieved. As regards the argumentation relevant to the general scheme specific to public infrastructure projects, the Commission refers to its analysis in recitals 92 to 97 and 107 above. In particular, the Commission considers that a measure applicable to companies in charge of public infrastructure projects only applies to a category of undertakings and consequently is selective.

Justification by the logic of the tax system

(206) The Greek authorities and PCT argue that this exemption is consistent with the general scheme of the progressive phasing out of stamp duty with the principle of equality, as it represents the mechanism for ensuring that the particular characteristics of public infrastructure projects are treated accordingly for tax purposes. The Commission cannot accept that these "objectives" justify the measure in question and refers to each analysis in recitals 189 to190 above relevant to the stamp duty exemption of PCT's loans.

(207) Moreover the Greek authorities and PCT argue that this exemption is consistent with the principle of equality. In particular in its absence and given that PPA was exempted at the time of the adoption of the ratification law, from the payment of stamp duty in respect of transactions concerning the implementation of works on its behalf by other persons, PCT would be obliged to pay stamp duty whenever this would arise from its arrangements with PPA.

(208) However, as already pointed out in the opening decision[149] the fact that PPA may be exempted from stamp duties does not mean that such exemption in favour of PCT is justified by the nature of the tax system.

(209) The Commission notes that Law 4152/2013 abolished this provision. Thus the selective advantage in favour of PCT would only refer to the past.

5.3.8. Following PCT's application, protection provided for in Legislative Decree 2687/1953 for the investment of the concession contract (article 3).

Description of the legislative decree and the measures that it may involve

a. Procedure

(210) Legislative Decree 2687/1953 allows the Greek administration to grant a specific favourable regime to any company that imports foreign capital in order to make "productive investments". In order for the company to benefit from this regime, it has to apply to the Ministry of National Economy. Following the company's application, a specific committee issues an opinion after assessing:

- whether the investment is "productive", i.e. if it aims at the development of the national production or if it contributes to the economic development of the country;

- whether it concerns foreign capital, including any nature of capital, i.e. foreign currency, machinery and materials, inventions, technical methods, as well as trademarks;

[149] See recitals 188 and 203 of the opening decision.

- the "usefulness" of the import of foreign capital; on this specific point the decree does not include any definition or criteria that have to be fulfilled, thus granting a discretion to the national administration.

(211) Following this opinion the responsible Minister, depending on the importance of the investment, proposes an irrevocable presidential decree or adopts a ministerial decision approving the import of foreign capital under specific conditions decided therein and granting an irrevocable favourable regime[150].

b. Privileges that may be granted

(212) The presidential decree/ministerial decision that may be adopted for a specific company grants the following fiscal "facilities"[151]:

- a freeze on the tax rate applied on profits for a period not exceeding 10 years or application of a lower tax rate[152];
- reduction or exemption from custom duties or charges on imports of machinery etc., for a period not exceeding 10 years;
- lower tax rate or exemption from any tax imposed by local authorities or port authorities for a period not exceeding 10 years;
- reduction or exemption from any charges and royalties of any kind in connection with the registration of mortgages or the creation of a pledge as security for the imported capital or for the conclusion of any contract related thereto;
- prohibition of export restrictions or taxes;
- prohibition of the retroactive imposition of tax;
- exemption from forced expropriation in favour of the State of assets of the beneficiary company;
- prohibition of the requisition of assets of the undertakings under protection;
- recruitment of foreign nationals as technical and administrative personnel and permission for exporting the mount of their remuneration in foreign exchange;
- permission for the repatriation of loans or share capital (up to 10% of the annual imported capital); a cumulative export of profits (up to 12%

[150] This specific regime may only be modified in case the company, to which it is allowed, agrees to.
[151] Articles 8 and 11 of the legislative decree.
[152] An adjustment may also be foreseen in case of reduction of the normally applicable limitations.

without tax, of the imported and repatriated annual capital); export of interests (up to 10% annually)[153].

(213) According to the legislative decree, the assets of companies that are created or significantly increased[154] with foreign capital under this decree are exempted from any forced expropriation in favour of the State, as well as from any requisition of their assets[155]. Finally, there is a specific provision establishing the principle of no retroactive imposition of tax for all companies covered by the legislative decree[156].

System of reference

(214) As the protection provided under Legislative Decree 2687/1953 may vary depending on the measures that are decided each time in respect of each specific undertaking that falls within such "protection", and the exemptions that can be granted to PCT due to this decree have been determined in this decree indicatively, the general system of reference may include the different tax measures from which the beneficiary will benefit once the administration will adopt the specific regime PCT will request.

(215) The Greek authorities and PCT argue that as this decree has been set up as a law of superior validity attached to it by the Constitution, it cannot be considered as a "special" measure which can be compared with the "general" legislative framework. When this decree was adopted and given its superior legislative validity, the majority of the national legislative framework which the Commission uses as the "system of reference" did not even exist. Thus the "system of reference" which needs to be taken into account in this respect is the Greek Constitution and Legislative Decree 2687/1953 itself as a general measure. Moreover the Commission was already aware of its existence since Greece's accession.

(216) The Greek authorities and PCT also argue that the special protective regime for foreign investments is a general measure that applies to all foreign investments that satisfy objective criteria for its application. They also argue that rationale for the decree was the need to (a) recognise that foreign investments in the circumstances applying to Greece faced particular risks and

[153] This measure is not foreseen in the presidential decree, but the Greek authorities mentioned it in the list of measures that have been provided in the past through this special regime.

[154] According to Article 9 paragraph 2 of the presidential decree, this increase is meant as exceeding half of the amount corresponding to the total assets of those companies or above 1 million US dollars.

[155] Unless requisition is aimed at covering the needs of the armed forces in times of war and only for as long as the conflict lasts and subject to fair compensation.

[156] The decree also foresees other privileges/conditions for the companies covered: i) specific conditions for the repatriation of loans or share capital permission for the repatriation of loans or share capital (up to 10% of the imported capital annually); a cumulative remittance of profits (up to 12%, net of tax, on the imported and non-repatriated capital annually); and a remittance of interest (up to 10% annually) and permission for the transfer out of Greece of foreign exchange needed for lease payments concerning machinery or other forms of capital leased from abroad), (ii) the recruitment of foreign nationals as technical and administrative personnel and permission for exporting the amount of their remuneration in foreign exchange; and permission to keep company accounts with entries in a foreign currency.

challenges and thus required particular treatment, in order to achieve the objective of attracting such investments and (b) provide appropriate treatment in this regard.

(217) Moreover the Greek authorities and PCT argue that the reply of Commissioner Tajani[157] as regards this decree only excluded the new measures in the area of customs tariffs and not State aid measures. According to them, it is clear that the application of this decree to date has not given rise to new unlawful State aid, since it was in force when Greece entered the EU and continued applying it without amendment and so far as the Commission has not taken any step to put into question the lawfulness of this decree under EU law.

(218) The Commission notes that the legislative decree in question cannot be considered as a valid system of reference. Although it is true that this decree existed before the accession of Greece in the EU, this does not mean that this decree is of a superior validity than the Treaty of the Functioning of the European Union and thus the provisions of this Treaty relevant to State aid. When Greece joined the EU it had to adhere to the "acquis communautaire" and in particular it should respect the rules of the Treaty on State aid. Thus in case Greece makes use of this decree by granting specific advantages to specific companies, it should first notify them to the Commission for assessment under State aid rules and possible approval under the rules of the Treaty[158].

(219) Moreover, this decree allows a wide margin of discretion[159] to the administration to establish the conditions, as well as the advantages that will be granted to the specific undertakings that will make use of it. The specific treatment of foreign investments in Greece with the purpose of promoting them entails already selective elements. At the same time it aims at a public policy objective and not a taxation objective. A valid system of reference for the purposes of the selectivity analysis can only be based on taxation principles. Public policy objectives are extrinsic objectives to a tax system as already indicated in recitals 92 to 94 of this decision and thus they cannot be considered as the purposes of a system of reference for the purposes of the selectivity assessment.

Derogation from the system of reference

(220) Article 3 of Law 3755/2009 allows PCT to apply for the protective regime foreseen under the described legislative decree. This provision has as a

[157] See recital 213 of the opening decision.

[158] The Commission's assessment in this case is without prejudice of any action it may take as regards this presidential decree.

[159] Article 3§2 of the decree refers indicatively to some of the privileges and exemptions that can be granted through its use. Article 5§3 of legislative decree 4256/1962 interpreting the one of 1953, establishes that the administration has the full discretion to regulate any other issue that is related to the investment in any way it sees fit for the accomplishment of the purpose of the presidential decree, i.e. the attraction of foreign capital, as long as these issues do not run counter its provisions. Therefore, it can be concluded that the administration has full discretion in the establishment of new conditions, as well as a "facilities" that may render such investments more attractive for companies.

consequence that several selective advantages may be granted to PCT upon its request by the Greek administration. These advantages mainly consist in taxes that PCT would have to pay under normal rules and from which it could be exempted thanks to this provision. In addition, the exemption from other legal constraints (forced expropriation, requisition of assets, permission to recruit foreign staff and exporting their remuneration in foreign exchange, permission to repatriate loans or share capital) could in the future also favour PCT. The fact that these advantages have, according to the Greek authorities, not actually been granted to PCT yet, does not take away the fact that the provision under examination gives the right to PCT to request and obtain the privileged framework set out in the decree.

(221) As regards the measure in favour of PCT the Greek authorities do not provide additional argumentation than the one initially provided. Thus the Commission's conclusion as regards the selective character of this measure remains the same[160].

(222) As already indicated above[161] the fact that a measure may have an economic policy objective does not mean that it is not selective, but that it may be considered compatible with the internal market, if certain conditions are complied with[162].

(223) Moreover, independently of the nature of the regime provided under the legislative decree[163], its individual application may take the feature of a selective advantage[164], given that every decision of the Greek administration may depart from the general tax rules to the benefit of PCT. According to the Fiscal Notice[165], such finding leads to a presumption of State aid and must be analysed in detail. On this basis the Commission considers that the provision in question entails a selective advantage in favour of PCT that will be implemented in case PCT decides to make use of it.

Justification by the logic of the tax system

(224) The Greek authorities argue that the specific regime under this decree aimed at attracting foreign capital and facilitating the reconstruction of the country following the Second World War and the civil war in the 1940s'. Given its importance for Greece's economic development, Article 107 of the Greek Constitution expressly recognises that it prevails over ordinary laws. Indeed this was done in order to ensure that investors of foreign capital are protected against the constant modifications of Greek tax law that are not favourable for foreign investments. However the same purpose of this protective regime which is the development of the Greek economy cannot justify the selective

160 See recitals 209 to 216 of the opening decision.
161 See recitals 92 to 97 of this decision.
162 Case C-487/06 P, British Aggregates [2008] ECR I-10515, paragraph 92.
163 This decision is without prejudice to the position the Commission may take as regards this Legislative decree.
164 See recitals 21 and 22 of the Commission Fiscal Notice.
165 Commission Notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

character of the measure, but can only be taken into account within the compatibility assessment.

(225) The Commission also notes that since this protective regime that could be granted to PCT upon its request, would be granted on a discretionary basis, it cannot be justified by the nature or general scheme of the tax system[166].

(226) Therefore the provision at stake entails a selective advantage in favour of PCT that cannot be justified by the nature or the general scheme of the system.

Existing aid

(227) The Greek authorities and PCT argue that in case the Commission considers that the application of this decree constitutes aid, it would be existing aid.

(228) The Commission notes that the provision in favour of PCT was adopted in 2009 and not before the accession of Greece to the EU. This provision gives the right to PCT to apply and obtain this specific regime. Once PCT applies, a presidential decree or a ministerial decision has to be adopted that will determine the specific advantages that PCT will enjoy. Thus a specific application of the decree upon PCT's request will have as a consequence that the concrete implementation of the measures will take effect at the moment the granting act will be adopted. In conclusion the measure in favour of PCT constitutes new aid.

5.3.9. Exemption from the general rules of forced expropriation

(229) The complaints received in this case referred to an exemption provided to PCT as regards the rules of forced expropriation. The law having ratified the concession contract did not refer to any such exemption. The Greek authorities and PCT indicate that no such exemption was granted and the Commission has no reason to believe that this is not the case. Therefore the Commission considers that this type of advantage was not granted to PCT.

5.4. Comparison of the above mentioned State aid measures with similar provisions in other contracts of big infrastructure projects

(230) The main argumentation submitted in respect of the justification of the above fiscal measures refers to the necessity to support big public infrastructure projects by ensuring a clear, flexible and stable fiscal regime to companies that implement them in Greece. To support their argumentation, the Greek authorities and PCT refer to a number of Commission decisions that considered that no State aid was involved in the financing of big infrastructure concession contracts that include similar fiscal exemptions.

(231) The Commission has examined the argumentation provided and has come to the following conclusions.

[166] See recitals 24 and 27 of the Commission Fiscal Notice.

(232) First of all, according to a well-established case law[167], this type of argument is irrelevant for the assessment of the legality of a Commission Decision. Every case should be assessed on the basis of Article 107 (1) FTEU, taking into account its own merits. In any event as mentioned in point 107 of the present decision, the existence of similar measures in other contracts of big infrastructure projects only means that these measures are applicable to a category of companies and consequently are selective.

(233) In any event, all the decisions, to which the Greek authorities and PCT refer, dealt with different situations.

(234) The Commission considers further that the Athens International airport case[168] conclusion is not applicable in the current case. In that case, the activities benefiting from aid either were not economic or were not liberalised at the time, and therefore no State aid was involved. On the contrary in the current case, the Greek State has itself opened the provision of port infrastructure services to competition by tendering out the part of the port that is the object of the concession contract. Thus the "non liberalisation" reasoning of this old decision is not applicable in this case.

(235) Concerning the Athens Ring Road and Rio Antirrio Mororway Bridge cases, the Commission notes that even if a summary of the fiscal provisions applicable in those concessions was included in the description of the State measures in respect of those projects, the Commission did not expressly pronounce itself on these specific provisions, but only assessed whether the State's support for the project was the minimum necessary, as well as whether the tender procedure that took place had as a result the market price. Most of the other decisions[169] do not even refer to the tax exemptions in favour of the concessioners (let alone the fact that they are justified by the logic of the fiscal system) and merely assess whether or not the tender procedure was sufficiently open, non-discriminatory and based on the lowest price. The fact that the Commission received the relevant concession contracts that referred to several tax exemptions during the notification does not mean that the Commission examined them from the State aid viewpoint or has pronounced itself on those specific measures. According to the Court's case law, the Commission should clearly and expressly take a position on measures in order for the beneficiaries to consider that these measures do not entail State aid. The silence of the Commission does not mean that these measures were approved[170].

---

167 See for instance Judgement of the General Court in case T-445/05, *Assogestioni et Fineco Asset Management/Commission*, para 145, and quoted case law.

168 See Commission decision in case NN 27/1996 Spata International Airport.

169 See Commission decisions in cases N 508/2007 Ionia Odos, N 45/2008 – Motorway Elefsina-Korinthos-Patras-Pirgos-Tsakona, N 566/2007 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/2007 Central Greece Motorway, N 633/2007 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzona Motorway concession contract, N 134/2007 Thessaloniki Submerged Tunnel concession contract.

170 Joint cases T-427/04 *France v. Commission* and T-17/05 *France Telecom v. Commission*, ECR [2009] II-0435, paragraphs 264-266, C-474-09 P to C-476/09 P, Territorio Histórico de Vizcaya - Diputación Foral de Vizcaya, Territorio Histórico de Álava - Diputación Foral de Álava, and

(236) In the same line of reasoning, the fact that in the broadband development decision[171], the Commission mentioned as legal basis the Public Private Partnership law that includes similar provisions, does not mean either that the Commission assessed implicitly these provisions. Finally the Thessaloniki Submerged Tunnel case[172] does not seem relevant as the tax measures were not included in the assessment either and at any case the successful bidder refrained from taking advantage of the option, included in the tender documents, to benefit from operational subsidies.

(237) Moreover the Greek authorities and PCT argue that the Commission has maintained its position as regards its relevant assessment in these cases following the issuing in December 2013 of its State aid decisions concerning the amendments to four of such projects[173]. The Commission notes in this respect that these decisions do not even refer to any fiscal provisions, as their object is different, let alone an assessment on behalf of the Commission.

(238) In view of the above it cannot be considered that the Commission "approved" similar provisions in the past and that such "approval" could be invoked by the beneficiary in order to exclude the existence of State aid[174].

(239) Hence, the Commission concludes that the measures examined above (with the exception of measure in 5.3.9) are selective advantages which are not justified by the nature and general scheme of the tax system.

5.5. Distortion of competition and effect on trade

(240) The measures above that constitute selective advantages, may constitute State aid if they distort or threaten to distort competition and in so far as they affect trade between Member States. According to settled case law, a selective advantage granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes[175]. A distortion of competition within the meaning of Article 107 TFEU is thus

---

Territorio Histórico de Guipúzcoa - Diputación Foral de Guipúzcoa v. European Commission, [2011] I-113, paragraph 70.

171 SA. 32866 (2011/N) – Greece – Broadband development in Greek rural areas.

172 See Commission decision in case N 134/2007 Thessaloniki Submerged Tunnel concession contract.

173 See Decision C(2013) 9253 final - State Aid SA.36894 concerning the reset of the Ionia Odos S.A. project; Decision C(2013) 9275 final – State Aid SA.36877 concerning the reset of the Aegean Motorway S.A. project; Decision C(2013) 9253 final – State Aid SA.36878 concerning the Olympia Odos S.A. project; and Decision C(2013) 9274 final – State Aid SA. 36893 concerning the Central Motorway (E65) project.

174 In any case, the Commission further understands that the tax exemptions in favour of PCT were only introduced in the law that ratified the concession agreement and not in the concession agreement itself, because PPA has no competence to grant tax exemptions. Contrary to the cases invoked by the Greek authorities and PCT, the concessioner in this case was supposed to undertake exclusively and solely the investment project, without any State or public support of any kind.

175 Case 730/79 Philip Morris [1980], ECR 267, paragraph 11, joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, Alzetta Mauro and others v. Commission, [2000] ECR II-2325, paragraph 80.

assumed inasmuch as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition[176].

(241) As the Greek State has tendered out at international level the concession that Cosco undertook, it has opened up the port market services to competition. As different undertakings from several Member States may compete for the adjudication of port concessions, the grant of the specific fiscal advantages to PCT that were not available to all possible candidates at the time of the tender can be considered as at least potentially distorting competition.

(242) Already when PCT took over the concession agreement, the Port of Piraeus had substantial capacity (1.6 M TEUs) and was considered as potentially competing with other EU ports[177]. For example, the Port of Thessaloniki, the Port of Constanza in Romania, the Port of Koper in Slovenia and a number of ports in Italy may be considered as direct or at least potential competitors of PCT. According to the concession agreement, Piers II and III of the Container Terminal that are exploited by PCT are foreseen to reach a very important capacity (up to 3.7 M TEUs) up to 2015. This new capacity, the creation of which has been facilitated by the measures at stake, has the potential to affect both competition and trade between Member States, as different ports in several Member States may also have the same clients as PCT and are at least potentially in competition with it.

(243) Moreover, the Commission notes that transhipment container terminals, like the one of the beneficiary, are much more exposed to competition, including from third countries (in the Mediterranean area). As an example, due to this investment, Cosco has concentrated its Mediterranean shipping operations in Piraeus instead of Italian and Spanish transhipment ports that it was using before. PCT competes with other EU ports and will increase its position in the market in the next years.

(244) As the fiscal measures at stake secured additional cash flow to PCT, in particular at the first stages of the construction project, they helped Cosco to expand its activities in the EU market of port services and potentially strengthened its competitive position in this market.

(245) It results from the considerations above that the measures at stake are likely to affect trade between Member States and distort or threaten competition. According to the Court's standard case law, it is sufficient to establish that the aid in question is likely to affect trade between Member States and threatens to distort competition[178]. In view of the above analysis, the Commission does not consider it necessary to further define the exact range of the services or

---

176 Joined cases T-298/97, T-312/97 etc. Alzetta [2000] ECR II-2325, paragraphs 141 to 147, case C-280/00, Altmark Trans [2003] ECR I-7747.

177 See Commission decision of 18.12.2009 on case C21/09 (ex N 105/2008, N 168/2008 and N 169/2008 – Greece – Public financing of infrastructure and equipment at the Port of Piraeus, OJ C 402 of 29.12.2012, p. 25, paragraphs 90 and 91.

178 See joint cases T-298/97, T-312/097 etc. Alzetta [2000] ECR II-2325 paragraphe 95, and case 730/97 Philip Morris [1980] ECR 267, paragraphes 9 to 12.

geographic market in question or analyse in detail its structure and the ensuing competitive relationships[179].

(246) As regards the argument presented by PCT that the assessment of the effect of the fiscal measures on competition and trade would require an examination of the equivalent tax systems applying within the relevant markets, the Commission notes that according to settled case law[180] the fact that a Member State seeks to approximate by unilateral measures the conditions of competition in a particular sector of the economy to those prevailing in other Member States cannot deprive the measures in question of their character as aid.

Conclusion

(247) In view of the above the Commission concludes that all the tax advantages granted to PCT constitute State aid within the meaning of Article 107 (1) TFEU with the exception of the alleged exemption from the general rules of forced expropriation.

6. Assessment of compatibility of the measures

(248) The Greek authorities and PCT argue that the aid measures should be considered compatible with the internal market on the basis of Article 107(3)(a) and 107(3)(c) TFEU, as well as the EU regional aid rules.

6.1. Applicability of Regional aid guidelines 2007-2013[181] ("RAG")

(249) The Commission notes that the legal right of PCT to make use of the aid measures was conferred on it upon publication in the official journal of the law including the measures, i.e. on 30 March 2009[182]. Thus the Commission will assess the measures on the basis of RAG 2007-2013 that were applicable in March 2009.

(250) The Commission notes that the aid measures under assessment consist in uncapped fiscal advantages that cannot be considered as investment aid but as operating aid under regional aid rules. RAG 2007-2013 may exceptionally and in very limited cases allow operating aid[183] in regions eligible under the derogation in Article 107(3)(a) TFEU. The Port of Piraeus is situated in the region of Attiki that in March 2009 was a region eligible for regional aid under Article 107(3)(a) TFEU, as a "statistical effect" region[184]. Thus it has to be examined whether the aid measures comply with the conditions of operating

179 See among others joint cases Alzetta, paragraph 95.

180 See case C-372/97, Italy v. Commission [2004] ECR I-3679, paragraph 67 and the case law mentioned therein.

181 Guidelines on national regional aid for 2007-2013, OJ C 54, 04/03/2006, p. 13.

182 See article 8 of law 3755/2009 that determines the start of validity of this law.

183 See chapter 5 of the RAG 2007-2013 and Commission decision of 13 February 2008 in case C 7/2008 (ex N 655/2007) – Germany – Guarantee scheme of the Land of Saxony for working capital loans.

184 See Commission decision of 31 August 2006 in case N 408-2006 – Greece – Regional aid map 2007-2013, OJ C 286 of 23.11.2006, p. 5.

aid set out in the RAG. Operating aid under the RAG 2007-2013 may be allowed provided that it is justified in terms of its contribution to regional development and its nature and its level is proportional to the handicaps it seeks to alleviate. Moreover operating aid should in principle be granted in respect of a predefined set of eligible expenditure or costs[185] and limited to a certain proportion to these costs. It also has to be temporary and reduced over time and should be phased out when the regions concerned achieve real convergence with the wealthier areas of the EU.

(251) The Commission notes that given the nature of the aid and the handicaps it seeks to alleviate, in principle ad hoc aid, could not tackle such handicaps, as it is highly unlikely that granting operating aid to one undertaking would tackle the handicaps in a holistic way. Moreover, the justification put forward by the Greek authorities and PCT for the aid measures, i.e. the development and the modernisation of the sea container terminal transport sector, through the creation of legal certainty of the fiscal regime applicable to the investment project, cannot be considered as handicaps related to the region concerned that would need to be alleviated. Moreover, even if the Commission accepted such justification as pertinent in this case, there is no predefined eligible expenditure related to such handicaps and consequently aid amount. Moreover the aid measures are not digressive in time and were not meant to be phased out when the region of Attiki would become a "c" region on 1st January 2011[186]. Therefore the aid measures cannot be considered compatible on the basis of the RAG 2007-2013.

6.2. Direct application of Article 107(3)(c) TFEU

Objective of common interest

(252) In its Communication entitled *Sustainable Future for Transport: Towards an integrated, technology-led and user-friendly system*[187], the Commission underlined that the development of ports and intermodal terminals is key to achieving an integrating and intelligent logistic system in the EU. In the Communication on *Strategic Goals and Recommendations for the Maritime Transport Policy until 2018*[188], the Commission underlines that providing new port infrastructures, as well as improving the use of the existing capacities, is essential to ensuring that EU ports can cope efficiently with their gateway function.

(253) According to Council Regulation 1315/2013[189], the TEN-T could be best developed through a dual-layer approach, consisting of a comprehensive network and a core network. The comprehensive network constitutes the basic layer of the new TEN-T. It consists of all existing and planned infrastructure

185 For example replacement investment, transport costs or labour costs.
186 See footnote 184.
187 COM (2009) 279/4, paragraph 46.
188 COM(2009), 8.
189 Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348, 20.12.2013, p. 1.

meeting the requirements of the TEN-T Regulation. The core network should constitute the backbone of the development of a sustainable multimodal transport network, should stimulate the development of the entire comprehensive network and be in place by 2030 at the latest. The port of Piraeus is one of the seaports included in the EU core network.

(254) Within this context, the port of Piraeus is one of the biggest and most significant ones in the Mediterranean Sea and its operation is key to the development of Greece's economy and important for the development of the EU transport policy objectives. The investment that PCT undertook has developed a part of the Piraeus port to a modern sea container terminal by enhancing it efficiency, storage capacity, ability to service new generation freight ships and interconnectivity. Under the concession agreement it is expected that the capacity will increase from at least 300.000 TEU during the first year of the concession period to at least 3.700.000 TEUs after the eight year of the concession period. Thus it can be considered that investment in port facilities featured with elements of State aid can contribute to an objective of common interest.

Necessity and incentive effect

(255) According to the Commission case practice in this field, the necessity of the aid is established if it can be proven that the amount of the inflow of net revenues generated by the investment project is not sufficient to remunerate the investment costs of the investor. In essence if these revenues are not sufficient the project would not have been undertaken by a private investor without public support and State aid would be considered necessary.

(256) The Greek authorities and the beneficiary argue that the aid measures were necessary because without them the project finance arrangements that PCT would have achieved would have been much more onerous and might have potentially jeopardised the implementation of the project.

(257) The Commission has consistently considered that port infrastructure projects require considerable capital investments that can only be recovered in the very long term and their economic viability may not always be ensured without public support. However, in this case, PPA, the awarding authority that conducted the tender procedure for the selection of the concessionaire of the Port of Piraeus, had already estimated that the project's economic viability would be ensured, something that is proven by the fact that according to the tender documents the selected beneficiary was meant to undertake the whole investment on its own expenses. In addition, PCT undertook the extension of Pier II and the construction of Pier III, by assuming on its own all the investment costs that this project would entail. When it submitted its bid that was accepted by PPA, it had estimated that its investment in the Port of Piraeus would be profitable for it without the need of any public support, as otherwise it would not have submitted the bid or it would have submitted it with a reservation as regards the profitability of the project in the absence of a specific fiscal treatment. Moreover, the fact that Cosco aimed at turning the port of Piraeus into the first container terminal in the Mediterranean Sea demonstrates the potential of this port, as well as the profitability of the

investment project that was never questioned[190]. Therefore it cannot be considered that the measures under examination were necessary to ensure the economic viability of the investment project.

(258) The fact that the China Development Bank waited for the adoption of the ratification law does not demonstrate the necessity of the aid measures. Given that the concession contract had to be ratified by law in line with the Greek legislative practice, any bank would have waited for the adoption of the ratification law, without this being specifically related to the grant of the measures under examination. Moreover the protection requested by the European Investment Bank against general or discriminatory change in law, does not prove either the necessity of the aid.

(259) PCT only started the construction works after the ratification of the concession contract by law. But this is also related to the fact that all public contracts of this nature have to be ratified by law. Any company in the position of PCT would have waited for the ratification of the contract in any case. In addition, Cosco had committed to implement the project already at the time it submitted its bid and this took place before the adoption of the granting act, i.e. the ratification law. Once the submission of the offer was made, Cosco knew that it was legally bound to implement the investment, if it was selected by PPA as a successful bidder.

(260) Moreover, the beneficiary never invoked the existence of a funding gap that needed to be covered by the measures under examination. The fact that PCT only quantified the amount of the aid after the opening of the formal investigation procedure by the Commission, i.e. almost 5 years after the signature of the concession contract, demonstrates that the amount of aid was not taken into consideration by PCT in its initial business plan, and in particular when Cosco decided to undertake the investment. As regards the Commission decisions invoked by the beneficiary, where the Commission approved non-notified aid in cases where the aid had not been quantified in advance, the Commission notes that the cases mentioned are not applicable in the current case, as they do not concern funding of port infrastructure, where a specific funding gap has to be determined even for an ex-post analysis of compatibility. Consequently, this aid cannot be considered necessary for the implementation of the project, as PCT would in any case undertake it.

(261) In any case, as already explained above, the measures under examination consist in uncapped fiscal advantages that constitute operating aid which is normally prohibited. Such aid can only be accepted in exceptional specifically determined conditions. In the context of the compatibility analysis of the funding of port infrastructure project on the basis of article 107(3)(c), this type of aid cannot be considered as compatible.

[190] Furthermore, the economic viability and profitability of the investment project has already been confirmed by the fact that PCT's investments in the port of Piraeus have already very positive financial results.

(262) The beneficiary argues that the market failure in this case consists in the need to ensure stability, legal certainty and flexibility as regards the fiscal framework of the implementation of the concession contract. In this respect, the Commission notes that in accordance with its constant practice, the need to ensure stability, legal certainty and flexibility cannot be considered as a market failure, or as a valid basis of compatibility of aid measures. Moreover and most importantly, the absence of such a "framework" did not deter Cosco from undertaking to invest in the Port of Piraeus. Thus the Commission considers that the objective to ensure stability, legal certainty and flexibility cannot prove the necessity or the incentive effect of the aid measures under examination.

(263) In view of the above the Commission considers that the aid measures granted to PCT were not necessary, as it has not been proven that Cosco would have abandoned the implementation of the project in their absence. Thus the aid measures constitute operating aid, relieving PCT from costs that it would normally have to bear and cannot be declared compatible. In view of this conclusion, the Commission does not consider it necessary to examine further the other conditions of Article 107(3)(c), on proportionality and distortion of competition, in order to conclude that the aid measures are incompatible.

7. Recovery of the aid

According to established case law, aid regarded by the Commission as being incompatible with the common market has to be recovered in order to re-establish the previously existing situation[191]. As the measures above constitute unlawful and incompatible State aid, t the Commission should order the recovery of unlawfully granted aid that is incompatible with the internal market, unless the beneficiary can have legitimate expectations or rely on a general principle of EU law[192].

Quantification

(264) The quantification of the aid provided by the Greek authorities and the beneficiary was based on the hypothetical assumptions of PCT's business plan in 2009. Thus they cannot serve as a basis for the exact quantification of the aid amounts.

(265) In the absence of appropriate information on behalf of the Greek authorities, the present decision does not establish the exact amount of aid received by PCT for each one of the measures. However, the Commission considers that the following methodology should be followed by the Member State in order to determine the amount of incompatible State aid to be recovered from PCT:

- Exemption from income tax on interest accrued until the date of the commencement of operation of pier III:

[191] See for instance case C-348/93, Commission v. Italy, [1995] I-00673, paragraph 26, and the case law mentioned therein.

[192] See for instance joined cases T-239/04 and T-323/04, Italy and Brandt Italia SpA v. Commission, [2007] II-3265, paragraphs 153-154 and the case law mentioned therein.

(266) This measure involves aid to PCT that is equal to the income tax which PCT would normally have to pay on the accrued interests until the commencement of operations of Pier III and from which PCT was exempted based on Article 2§1 of the Law.

(267) The Greek authorities indicated that PCT did not benefit from this provision in practice, as it included in its taxable income the amount of interest accrued on cash deposits (and thus this income was subject to income tax). They should therefore provide evidence that this is indeed the case.

(268) In case PCT made use of this provision, the Greek authorities should first provide the following dates:

- The date since when PCT was exempted from income tax on interest accrued;
- The date when the operation of pier III started.

(269) The Greek authorities should take as basis the relevant deposits of PCT in the Greek banks each year (following the date of exemption from income tax on interest accrued), the relevant interests that derived each year and apply to them the income tax rate applicable each year.

- Right to VAT credit refund irrespective of the date of completion of the construction work or of its parts

(270) This measure involves aid to PCT that is equal to the full amount of the VAT refund that PCT is allowed to keep (under this provision) if 5 years after the realisation of the related expenditure, the project did not start.

(271) The Greek authorities have indicated that PCT has already put in use the investment project within 5 years from the start of the project, so the 5 year exemption period did not result to a specific amount to be recovered.

(272) However, the Greek authorities have not submitted any proof demonstrating that the construction of the project has been completed and that the investment was put in use. Therefore, the Greek authorities should provide proof demonstrating the project's completion of construction. In addition, they should also provide the list of invoices related to this construction and the dates when PCT received VAT refunds for these invoices.

(273) In case the construction of the project is not complete, the fifth anniversary from the date of refund of VAT for each invoice related to this construction would be the date of granting aid. The aid in each case would be the amount of VAT refunded.

- Broad definition of investment good => direct right to 90% VAT credit refund without audit

(274) This measure involves aid to PCT that is equal to the interests accrued on VAT refunded for all expenses other than for tangible goods (relating to the investment good), from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3

years later or up to the moment where PCT would have been able to offset its VAT input (concerning these expenses) against output VAT.

(275) The Greek authorities should make a distinction between the VAT relevant to tangible assets that fall within the scope of the notion of investment good and the VAT input related to other works and services. This VAT input will have then to be calculated. On the basis of the amount deriving from this calculation the Greek authorities will have to calculate the interest that the State should ask for the advance cash payment before the period of 3 years, up to which PCT could in any case be refunded. These interests must be calculated for the period from the moment the refund was put at the disposal of PCT up to the moment PCT would have been entitled to such refund, namely 3 years later. If it can be proven that it could be refunded before the 3 year period, the relevant interest will be calculated up to the moment where PCT would have been able to offset its VAT input (concerning these expenses) against output VAT.

- Right to arrear interests without temporal or procedural requirements in case the State does not refund VAT

(276) This measure involves aid to PCT that is equal to the interests which PCT can request (under this provision) from the Greek State once 60 days have passed from the moment it filed the relevant fiscal declaration (to request the VAT refund), while other companies in a similar situation would not be entitled to interests.

(277) PCT indicated that it did not make use of this provision. However, if this is not the case and such interests have indeed been paid by the State, then the Greek authorities should indicate the exact interests paid together with the dates when these payments took place. These dates would be the granting dates and the corresponding interests paid would be the aid amounts granted on these dates.

- Loss carry forward without temporal limitation

(278) The aid in this case would be the additional corporate tax that PCT would have to pay if no loss carry forward had taken place beyond the temporal limitation of five years. In other words, the aid is equal to the difference between the income tax that PCT actually paid and the income tax that it would have paid in the absence of the possibility to carry forward its losses more than 5 years after these losses occurred.

(279) The granting date in this case would be the date when the tax would have been due. The Greek authorities should submit data demonstrating the fiscal losses PCT had each year and whether they were carried forward for a period of more than 5 years. If this is the case, then they will have to calculate the impact of these losses on its taxable base and consequently the corresponding income tax that PCT did not pay due to this carry forward.

- Choice among 3 depreciation methods

(280) PCT indicated that it made use of the fixed straight line method. The Greek authorities should provide proof that only the fixed straight line method has been used and not provide any possibility to change to the other depreciation methods. If any other depreciation method has been used, the aid would be the difference between the corporate tax PCT would have to pay while using the fixed straight line depreciation method and the corporate tax while using any of the other two methods. The granting date of the aid would be the date when the additional tax would have been due.

- Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the work

(281) The Greek authorities should indicate whether PCT has contracted other loan agreements than the ones mentioned with Cosco. As regards these agreements, the aid granted to PCT would be equal to the corresponding stamp duties applicable for these loans. The dates of granting the aid amounts would be the dates when these stamp duties were due.

- Exemption in favour of PCT's creditors from taxes, stamp duties, contributions and any rights in favour of the State or 3rd parties that they would normally have to pay on contracts transferring the obligations and rights resulting from PCT's loan agreements

(282) This measure involves aid to PCT's creditors, in particular Cosco which is equal to the amount of stamp duty that Cosco would normally have to pay, under the generally applicable rules, in case of transfer of a loan contracted with PCT to a third party.

(283) According to the Greek authorities, Cosco has given two loans to PCT in 2009 which were paid out in 2011. On this basis, the Commission has no reason to believe that such a transfer took place.

(284) The Greek authorities should clarify if this provision has been used. If it is the case then they will have to determine the stamp duty that would be due for such legal acts.

- Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code

(285) This measure provides to PCT an advantage which is equal to the stamp duty that it would have to pay in such circumstances and from which it is relieved. The Greek authorities should indicate if this provision has been used. If it has been used then they will have to identify the aid amounts granted to PCT and their corresponding granting dates in the same way as described for the measures above.

- Following PCT's request, preferential regime for foreign investments

(286) The Greek authorities have indicated that this regime has not been used. Nevertheless, as mentioned in recital 220, PCT has a right to request and to obtain this preferential regime.

Timing Action

(287) Within two months following the notification of this decision to the Republic of Greece, Greece must inform the Commission of the measures planned or taken:

i. indication of the measures that indeed may fall under the de minimis regulation and submission of the relevant documentation proving this;

ii. indication of the measures that have been recovered or of the recovery planning put in place;

(288) Within four months following the notification of this decision to the Republic of Greece, Greece must inform the Commission that it has implemented the recovery.

(289) In principle this will be the final deadline for recovery.

(290) In the cases where PCT received an advantage not exceeding thresholds specified in the Commission Regulation (EC) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, such advantage is not considered state aid if all the conditions set by this Regulation are fulfilled, and is not subject to recovery.

(291) The sums to be recovered should bear interest from the date on which they were put at the disposal of PCT until their actual recovery. The interest should be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

8. Conclusion

(292) The Commission finds that Greece has unlawfully implemented the following aid measures in breach of Article 108(3) of the Treaty of the Functioning of the European Union:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of pier III;

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of "investment good" for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request;

3. Loss carry forward without any temporal limitation;

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III;

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project;

6. Exemption from taxes, stamp duties, contributions and any rights in favor of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom;

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code ;

8. Protection under the special protective regime for foreign investments.

(293) The Greek authorities did not exempt PCT from rules concerning forced expropriation and therefore they granted no aid to PCT in this context.

(294) All the aid measures identified above are incompatible with the Treaty and will have to be recovered.

HAS ADOPTED THIS DECISION:

Article 1

The following State aid measures in favour of Piraeus Container Terminal S.A. and its creditor, Cosco, unlawfully put into effect by Greece in breach of Article 108(3) of the Treaty on the Functioning of the European Union, are incompatible with the internal market:

1. Exemption from income tax on interest accrued until the date of the commencement of operation of pier III;

2. Right to VAT credit refund irrespective of the stage of completion of the contract object; definition of the notion of "investment good" for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request;

3. Loss carry forward without any temporal limitation;

4. Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III;

5. Exemption from stamp duties on the loan agreements and any ancillary agreement for the funding of the project;

6. Exemption from taxes, stamp duties, contributions and any rights in favor of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom;

7. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code;

8. Protection under the special protective regime for foreign investments

Article 2

The Greek authorities did not grant State aid by exempting Piraeus Container Terminal S.A. from rules concerning forced expropriation.

Article 3

1. Greece shall recover the incompatible aid granted referred to in Article 1 from PCT and its parent company Cosco.
2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiary until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
4. Greece shall abolish all provisions that allow the continuation of the measures referred to in Article 1 with effect from the date of adoption of this decision.
5. Greece shall cancel all outstanding payments of the aid referred to in Article 1 with effect from the date of adoption of this decision.

Article 4

1. Recovery of the aid granted referred to in Article 1 shall be immediate and effective.
2. Greece shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 5

1. Within two months following notification of this Decision, Greece shall submit the following information:

   (a) the total amount (principal and recovery interests) to be recovered from PCT and its parent company Cosco;
   (b) a detailed description of the measures already taken and planned to comply with this Decision;
   (c) documents demonstrating that PCT and its parent company Cosco have been ordered to repay the aid.

2. Greece shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiary

Article 6

This Decision is addressed to Greece.

Done at Brussels, 23.03.2015

For the Commission

Margrethe Vestager

Member of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
Directorate for State Aid
State Aid Greffe
B-1049 Brussels
Belgium
Fax No: (0032) 2-296.12.42